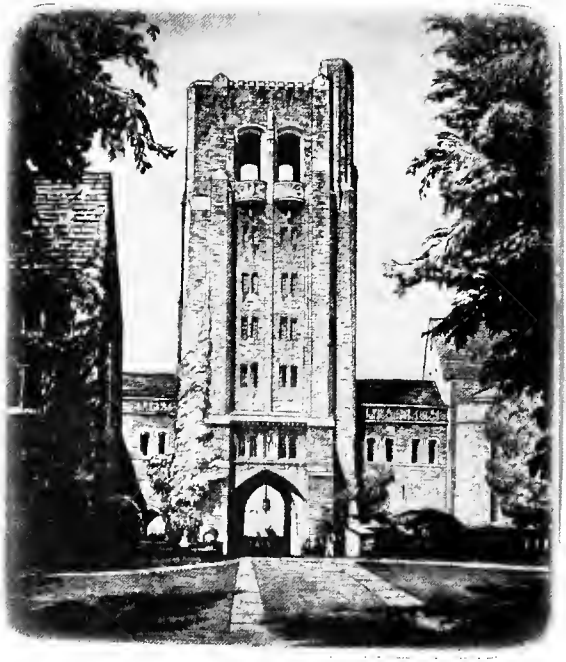

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HAND-BOOK

OF

CRIMINAL LAW

By WM. L. CLARK, JR.

SECOND EDITION

By FRANCIS B. TIFFANY

ST. PAUL, MINN.
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1902

PREFACE TO SECOND EDITION.

In preparing a new edition of Mr. Clark's book, no departure from the original plan of the author has been made. The book is intended, as explained in the preface to the first edition, to contain a concise, but full, statement of the general principles of the criminal law, exclusive of criminal procedure, which has been made the subject of a separate volume in the Hornbook Series by the same author. The editor has incorporated much new matter, which has necessitated changes in the original text, and has made other changes which were suggested to him by a use of the book in the class room. Many additional cases, most of them reported since the first edition, but some of them earlier leading cases, have been cited.

F. B. T.

St. Paul, June 4, 1902.

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CHAPTER XVIII.

FORMER JEOPARDY.

†

HAND-BOOK OF CRIMINAL LAW

SECOND EDITION

CHAPTER I.

DEFINITION, NATURE, AND PUNISHMENT OF CRIME.

DEFINITION OF CRIME.[1]

1. A crime may be generally defined as the commission or omission of an act which the law forbids or commands under pain of a punishment to be imposed by the state in a proceeding in its own name.

NATURE OF CRIME AND GROUND OF PUNISHMENT.

2. Crimes are prohibited and punished on the ground of public policy, to prevent injury to the public, and not to redress individuals, and therefore—

(a) A civil action by the person particularly injured does not bar a criminal prosecution by the state, nor does a criminal prosecution bar a civil action.

§§ 1–2. [1] The following are some of the definitions given in the books:

"An act committed or omitted in violation of a public law either forbidding or commanding it." 4 Bl. Comm. 5.

"A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bish. New Cr. Law, § 32.

Mr. Wharton does not define crime, unless a marginal note may be taken as a definition. This is that "crime is an act made punish-

(b) Condonation or settlement between the individuals is no bar to a criminal prosecution, except in case of certain wrongs not of serious injury to the public.

(c) Whether consent to the injury by the person particularly injured is a defense depends upon the circumstances:

(1) A person cannot consent to being deprived of inalienable rights; for instance, to being killed or maimed.

(2) Nor can he consent to a breach of the public peace, or to public immorality.

(3) He may consent to an assault and battery which does not maim, nor disturb the public peace.

(4) Want of consent is an essential ingredient of some crimes, in which case consent is a defense.

(5) The consent must in all cases be voluntary, and the person consenting must be mentally competent.

(6) Ordinarily, it is immaterial that the offender was entrapped into committing the crime.

(d) As a rule, the fact that the person particularly injured was also in the wrong is immaterial.

Prohibition by Law is Essential.

Acts may be prohibited either by statutes, or by a body of the law known as the "unwritten" or "common" law.[2]

able by law." In his text he says that, "at common law, a wrong which public policy requires to be prosecuted by the state is an indictable offense." 1 Whart. Cr. Law, § 14.

"The difference between crimes and civil injuries is not to be sought in a supposed difference between their tendencies, but in the difference between the mode wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party, or his representative, is a civil injury. An offense which is pursued by the sovereign, or by a subordinate of the sovereign, is a crime." Aust. Jur. § 17.

In some of the states the term "crime" is defined by statute. Pen. Code N. Y. § 3; Pen. Code Minn. § 3; Pen. Code Cal. § 15; and probably in other states.

[2] Post, pp. 17–24.

Prohibition by one or the other is essential. It is often loosely said that such and such an act is a crime, and that there ought to be a law against it, but an act is not a crime merely because it is wrong. It is not prohibited because it is a crime. It is prohibited because of its wrongful nature and injurious effect, and the fact of prohibition, together with the other considerations mentioned in the definition, makes it a crime. In the absence of prohibition by the law, no act is a crime, however wrong it may seem to the individual conscience. Thus, in Ohio the court was compelled to decide that it was not a crime to attempt to have carnal knowledge of a girl under the age of 10 years where she consented, for the reason that the statutes did not declare it a crime, and the common law, under which it might have been punished, had been abolished.[3] Furthermore, the law which prohibits must be in force, not only when the act is committed, but when it is punished. If the law ceases to operate, by its own limitation or by a repeal, before judgment, even after a conviction, no judgment can be given. Hence it is usual in every repealing law to insert a saving clause continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed.[4]

Public Policy the Ground of Punishment.

The ground upon which certain acts are declared crimes and punished, while others which may seem to some equally wrong are not, is, or should be, public policy or the public good. This is the foundation of the criminal law. Where

[3] Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355.

[4] Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; State v. Ingersoll, 17 Wis. 631; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Com. v. Duane, 1 Bin. (Pa.) 601, 2 Am. Dec. 497; State v. Williams, 97 N. C. 455, 2 S. E. 55; Wheeler v. State, 64 Miss. 462, 1 South. 632; State v. Mansel, 52 S. C. 458, 30 S. E. 481.

an act has a tendency to injure the public, it is the duty of the state, as the representative of the public, to take such steps as may be necessary to prevent it. It is for this reason that the state inflicts punishment, the primary object being to deter. Retributive justice does not of itself warrant infliction of punishment, for God alone can punish on that ground, but where the public good makes punishment necessary as an example to deter, the offender's desert of punishment justifies its infliction on him.* Aside from the consideration of public policy, the state would have no right whatever to punish any man; and the common law does not undertake to do so.[5]

The ground of punishment is not, however, an essential part of the definition of a crime. The elements essential to the more important crimes at common law have become fixed by judicial decision. Nevertheless, before the definitions of crimes had become crystallized, in determining whether the act complained of was a crime, the question whether the act was injurious to the public, as distinguished from the individual, was a test which the courts constantly applied;[6] and the test is still applied in determining whether particular acts fall within the definition of certain crimes, —such as nuisance[7] and offenses against the public peace,[8] of which injury to the public is an essential element. Statutes may sometimes seem to punish for purely private wrongs, although they are not supposed to punish for anything unless the public good so requires; and any act which falls

* See 4 Bl. Comm. 11. For a discussion of the various theories of punishment, see 1 Whart. Cr. Law, §§ 1–13, and notes.

[5] Post, pp. 21, 22.

[6] Rex v. Wheatly, 2 Burrows, 1125; Com. v. Warren, 6 Mass. 72; People v. Babcock, 7 Johns. 201, 5 Am. Dec. 256.

[7] Post, p. 345.

[8] Post, p. 394.

within the statutory definition, within constitutional limits, is necessarily a crime. The question of the ground of punishment is for the legislators.[9]

Trifling Offenses not Noticed.

Public policy clearly does not require the state to interfere and punish for an act unless it injures the public to a material extent, and the criminal law, therefore, does not usually notice trifling offenses. Nor does it notice wrongs which, though of serious injury to an individual as an individual, do not perceptibly injure or endanger the other members of the community. Of course, in theory, no injury can be done to one member of the community without injury to the community itself, but the injury is so slight in many cases that the act may be classed with the trifling offenses which the law does not notice.[10] This brings us to the distinction between a public and a private wrong, and the difference between the nature and purpose of the proceedings by which the one is punished and the other redressed.

Distinction between Torts and Crimes.

A wrong which injures another as an individual only, and affects the other members of the community so slightly that the public good does not require the state to notice it, is only a private wrong or a tort.[11] Those acts which injure the community as a community are public wrongs, and, where they are made punishable by the state in a proceeding in its own name, they are crimes. Public wrongs or crimes are

[9] See Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496.

[10] 1 Bish. New Cr. Law, §§ 212–228.

[11] 4 Bl. Comm. 5; 1 Whart. Cr. Law, § 15; 1 Bish. New Cr. Law, §§ 229–254; Jag. Torts, 8. For a clear statement of the distinction, see Cooley, Torts (2d Ed.) pp. 94–103.

also private wrongs if an individual suffers an injury from them different from that suffered by the community at large. Thus, if I merely trespass upon my neighbor's land,[12] or if I maintain on my own land, near his dwelling, a filthy pond, the odors from which reach no one but him,[13] I commit a wrong against him, but I do not perceptibly injure the other members of the community. In such a case the public good does not require the state to interfere and punish me, but it is considered sufficient if my neighbor is allowed to bring an action against me in his own name for redress. The wrong is a civil injury or tort, and the proceeding a civil action. If, on the other hand, I enter on my neighbor's land with force and arms,[14] or if I maintain a filthy pond in a thickly-settled community,[15] I injure the whole community; for, in the first case, I commit a breach of the public peace, and, in the second, I endanger the public health and comfort. Here the public good requires the state to notice the wrong, and punish it. The proceeding by the state is in no sense to obtain redress or compensation,[16] but is to punish me, and furnish an example to prevent similar acts in the future. This is a criminal proceeding or prosecution, and the act is a crime.

It is not to be supposed, however, that all wrongs which affect the public injuriously have always been crimes. At

[12] Rex v. Turner, 13 East, 228; Com. v. Powell, 8 Leigh (Va.) 719; Henderson's Case, 8 Grat. (Va.) 708, 56 Am. Dec. 160; Kilpatrick v. People, 5 Denio (N. Y.) 277.

[13] Com. v. Webb, 6 Rand (Va.) 726.

[14] Post, p. 399.

[15] Post, p. 345.

[16] Harger v. Thomas, 44 Pa. 128, 84 Am. Dec. 422. If the manifest purpose of a criminal prosecution is to enforce payment of a debt, or to punish its nonpayment, the courts will not lend their aid thereto. State v. Miller, 44 Mo. App. 159.

common law many wrongs which are to-day deemed public wrongs were treated only as private wrongs, and cognizable only by the civil courts. Thus, at common law it was not a crime to deprive a man of his goods or money by embezzlement or by false pretenses (except by false symbols or tokens[17]), although in such cases the injury to the public, according to modern views, is at least as great as if the goods or money are obtained by larceny,[18] which was a crime. Embezzlement,[19] obtaining property by false pretenses,[20] and many other public wrongs have been made crimes only by statute.

The distinction between public and private wrongs is illustrated by the separation of criminal from civil proceedings, and by different effect in each case of the action or conduct of the injured party upon the liability of the wrongdoer.

Civil and Criminal Proceedings for the Same Wrong.[21]

Where an act is both a tort and a crime, the wrongdoer is liable both to a civil action by the person he has particularly injured and to a criminal proceeding by the state. The two proceedings are distinct, and have a different object, the one being to obtain redress for the injury, while the other is to punish as an example; and neither proceeding is

[17] Cheating by use of false weights and measures, that may defraud the public generally, was a public wrong and a crime at common law; but cheating by lying and false representations was a mere private injury. Rex v. Wheatley, 2 Burrows, 1125. And see Rex v. Dunnage, Id. 1130; Hartmann v. Com., 5 Pa. 60; Com. v. Warren, 6 Mass. 72; People v. Miller, 14 Johns. (N. Y.) 371.

[18] Post, p. 271.

[19] Post, p. 307.

[20] Post, p. 316.

[21] 4 Bl. Comm. 6; 1 Whart. Cr. Law, § 31b; Cooley, Torts (2d Ed.) p. 101. For a review of the cases on this question, see Benn. & H. Lead. Cr. Cas. 42–50.

a bar to the other.[22] The fact, therefore, that one who has committed a crime has been held liable for damages in a civil action by an individual, is no defense when he is criminally prosecuted by the state. In cases of misdemeanor, the civil action may be brought before institution of the criminal prosecution, and carried on at the same time.[23] In cases of felony, which is a more serious grade of crime, it was formerly the rule in England and in a few of the states that the civil remedy was suspended until the wrongdoer had been prosecuted; but this doctrine has been questioned in England, and is not generally recognized in the United States.[24]

[22] Plummer v. Smith, 5 N. H. 553, 22 Am. Dec. 478; White v. Fort, 10 N. C. 251; State v. Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; Knox Co. v. Hunolt, 110 Mo. 67, 19 S. W. 628; Austin v. Carswell, 67 Hun, 579, 22 N. Y. Supp. 478; Lofton v. Vogles, 17 Ind. 107; Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 83; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

[23] Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698.

[24] The notion once prevailed that the civil remedy was merged in the felony, but whether the doctrine of an absolute merger ever existed has been doubted. Wells v. Abrahams, L. R. 7 Q. B. 554. In modern times it has been held in England that the merger amounts only to a suspension, as stated in the text. Lutterell v. Reynell, 1 Mod. 282; Crosby v. Leng, 12 East, 409; Osborn v. Gillett, L. R. 8 Exch. 88; White v. Spettigue, 13 Mees. & W. 603. Moreover, it has been doubted whether the doctrine existed even to this limited extent. Wells v. Abrahams, supra. In the United States the doctrine of the suspension of the civil remedy has been held by some courts. Boody v. Keating, 4 Greenl. (Me.) 164; Martin's Ex'x v. Martin, 25 Ala. 201. But it has more frequently been denied. Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 83; Williams v. Dickenson, 28 Fla. 90, 9 South. 847. See Bishop, New Cr. Law, §§ 267–272; Jag. Torts, 11.

Condonation and Settlement between the Wrongdoer and the Person Injured.

Another distinction between torts and crimes should be noticed. In case of a tort, the injured person may settle with the wrongdoer, or may refrain from bringing an action against him. In case of a crime, however, as soon as it is committed the injury is done, and the state's right and duty to punish accrue. As a rule, the person particularly injured has no control over the criminal proceedings, and no settlement between him and the wrongdoer can make the act any the less a crime, or take away the state's right to punish it.[25] In case of felonies (a higher grade of crimes, which will be hereafter explained), a person settling with the offender, and agreeing not to inform on him, is himself guilty of a crime.[26] There are some exceptions to the rule in case of misdemeanors, or the lower grade of crimes, such as assaults. There are, in some of the states, statutes allowing the wrongdoer to make reparation, and relieving him from punishment on his doing so; but, except in case of some misdemeanors, they are in derogation of the common law. It has lately been held that a woman who has been ravished cannot condone the crime by excusing or forgiving her ravisher.[27]

[25] Embezzlement, settlement by defendant's bondsmen no defense. Fleener v. State, 58 Ark. 98, 23 S. W. 1; Robson v. State, 83 Ga. 166, 9 S. E. 610. A compromise is no bar to a prosecution for seduction. Barker v. Com., 90 Va. 820, 20 S. E. 776. Ratification is not a bar. State v. Frisch, 45 La. Ann. 1283, 14 South. 132; May v. State, 115 Ala. 14, 22 South. 611. Nor can forgery be condoned. State v. Tull, 119 Mo. 421, 24 S. W. 1010. See, also, post, p. 383.

[26] Post, p. 383.

[27] Com. v. Slattery, 147 Mass. 423, 18 N. E. 399. See, also, Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Thalheim v. State, 38 Fla. 169, 20 South. 938; Williams v. State, 105 Ga. 606, 31 S. E. 546.

Consent of Person Injured.

With respect to civil wrongs the rule prevails that no man can complain of an act to which he consents. "Volenti non fit injuria." Whether or not consent of the person injured by an act deprives it of its criminal character depends upon the nature of the act. No man can take his own life or maim himself, these being among the inalienable rights, and he cannot consent to another's killing or maiming him.[28] Nor can a person consent to a breach of the public peace,[29] or to acts endangering the public safety or the public morals.[30] Thus, it is a crime to engage in mutual combat in a public place, or to commit incest or adultery, and the consent of the parties furnishes no excuse. On the other hand, there are rights which a man may give up. He may consent to an assault and battery, provided it does not maim or cause severe bodily injury, and is not inflicted so as to be a breach of the peace. Mutual combat in private, where the parties are not maimed, or severely injured, is no crime.[31] Again, in certain crimes, such as rape and larceny, and, as a rule, in crimes against property, want of consent is of the essence of the crime; and hence, if there is consent, the crime is not committed. It is not rape to have intercourse with a woman who consents, since, to constitute

[28] Killing in duel: Reg. v. Barronet, Dears. Cr. Cas. 51; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396. Administering poison: Com. v. Stratton, 114 Mass. 303, 20 Am. Rep. 350. Maiming: 1 Inst. 107a, 107b; Wright's Case, Co. Litt. 127a; People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303. See Reg. v. Bradshaw, 14 Cox, Cr. Cas. 83 (football match).

[29] Post, p. 243. And see Fost. Cr. Law, 260; 1 East, P. C. 270; Rex v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

[30] Com. v. Barrett, 108 Mass. 302; Sanders v. State, 60 Ga. 126; Tucker v. State, 8 Lea (Tenn.) 633.

[31] Post, p. 243.

rape, the intercourse must be by force, and against her will.[32] So, to constitute larceny, the property must be taken without the owner's consent.[33] And in cases of extortion by putting in fear, under the New York Code, or of robbery which is committed by force or intimidation, if the property is delivered by the owner for the purpose of prosecuting the taker, the crimes are not committed.[34] If, in any case, the consent of the person injured is obtained by threats,[35] or if, because of mental defect or disease by reason of youth or insanity, he is in law incapable of consenting, his consent furnishes no excuse.[36] In some states the statute makes it rape to have intercourse with a female under a certain age, whether she consents or not. Here, of course, consent is no excuse, however capable mentally the girl may have been of consenting.[37]

Same—Entrapment into Crime.[38]

Where a person learns that a crime is to be committed, and, instead of trying to prevent it, lays a trap to catch the

[32] Post, p. 216.

[33] Post, p. 289.

[34] People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072; Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295.

[35] Post, pp. 216, 219, 243, 264, 326.

[36] State v. Rollins, 8 N. H. 550; Same v. Farrar, 41 N. H. 53; Com. v. Nickerson, 5 Allen (Mass.) 518; Givens v. Com., 29 Grat. (Va.) 830; Hadden v. People, 25 N. Y. 373.

[37] Post, p. 219.

[38] Railroad detective laying obstruction on track, person present and assenting not criminally liable. State v. Douglass, 44 Kan. 618, 26 Pac. 476. Entrapment by detective into illegal sale of liquor, no defense. People v. Murphy, 93 Mich. 41, 52 N. W. 1042; People v. Curtis, 95 Mich. 212, 54 N. W. 767; City of Evanston v. Myers, 172 Ill. 266, 50 N. E. 204. See, also, post, pp. 107, 293. One who accepts a bribe is not excused because instigated by others for entrapment.

offender, he does not thereby consent to the crime. He may, however, act in such a way that his co-operation or consent deprives the proposed crime of an essential element;[39] and, of course, in such a case there can be no criminal liability. The owner of property, on learning that an attempt is to be made to steal it, may leave it exposed, and the person who takes it may be guilty of larceny; but, if he consents to the taking for the purpose of prosecuting the offender, there is no crime, as property must be taken without the owner's consent to constitute the crime of larceny.[40] The same is true of robbery.[41] In case of burglary, if the owner knows that it is to be committed, and merely takes no steps to prevent it, but lies in wait to catch the burglar, he does not consent to the entry,[42] though it is otherwise if he takes steps to aid the intending burglar, as where he unlocks the door to admit him, or instructs his

People v. Liphardt, 105 Mich. 80, 62 N. W. 1022. See, also, State v. Dudoussat, 47 La. Ann. 977, 17 South. 685. Conspirator to rob may be convicted though entrapped into attempt. Thompson v. State, 106 Ala. 67, 17 South. 512. It is no objection to conviction for mailing obscene matter that a government inspector, who instigated the proceeding, wrote decoy letters, in answer to which defendant mailed the matter. Price v. U. S., 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727.

[39] Rex v. Martin, Russ. & R. 196.

[40] Rex v. Headge, 2 Leach. 1033; Reg. v. Lawrance, 4 Cox, Cr. Cas. 438; Pigg v. State, 43 Tex. 108; People v. Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238 (feigning drunken sleep not consent); State v. Hull, 33 Or. 56, 54 Pac. 159, 72 Am. St. Rep. 694; State v. Adams, 115 N. C. 775, 20 S. E. 722.

[41] McDaniel's Case, Foster, 121; Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295.

[42] Rex v. Bigley, 1 Craw. & D. 202; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 364; State v. Sneff, 22 Neb. 481, 35 N. W. 219; State v. Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284 (failure to fasten door securely, as usual, no defense).

servant to do so.[43] If the owner of a store, or his servant, by his authority, instigates a person to break and enter for the purpose of stealing, the latter is not criminally liable.[44]

Crime or Negligence on the Part of the Person Injured.

The fact that a person who has been injured by a crime was in the wrong, or guilty of negligence contributing to the injury, does not as a rule furnish an excuse for the crime, for this does not make the act any the less an injury to the public.

A person who has stolen property cannot defend on the ground that it was negligently left where it could be stolen,[45] nor can he defend on the ground that it had been stolen by the person from whom he stole it.[46] On a prosecution for obtaining goods by false pretenses, it has been held no defense that the prosecutor was himself trying to cheat the defendant, or do other unlawful acts;[47] and in England there was a conviction for uttering counterfeit money, where

[43] Rex v. Egginton, 2 Leach, 913; Allen v. State, 40 Ala. 334, 91 Am. Dec. 476; Speiden v. State, 3 Tex. App. 157, 30 Am. Rep. 126; Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139; 1 Bish. New Cr. Law, § 262, and cases cited.

[44] People v. McCord, 76 Mich. 200, 42 N. W. 1106.

[45] Post, p. 293.

[46] Com. v. Finn, 108 Mass. 466; Ward v. People, 3 Hill (N. Y.) 395. See, also, Rex v. Beacall, 1 Car. & P. 454. It is no defense to an indictment for larceny of liquors, or for embezzlement of the proceeds of their sale, that they were kept for sale or sold in violation of law. Com. v. Smith, 129 Mass. 104.

[47] Reg. v. Hudson, 8 Cox, Cr. Cas. 305; Com. v. Morrill, 8 Cush. (Mass.) 571; In re Cummins, 16 Colo. 451, 21 Pac. 887, 13 L. R. A. 752, 25 Am. St. Rep. 291; People v. Martin, 102 Cal. 558, 36 Pac. 952. See, also, post, p. 322. "If the other party has also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment, because each deserved it equally." Per Dewey, J., in Com. v. Morrill, supra. But see, contra, McCord v. People, 46 N. Y. 470.

it had been given to a prostitute by defendant in return for allowing sexual intercourse.[48] In some cases the conduct of the person injured may in law amount to an excuse or a justification for the injury. Thus, as will be seen hereafter, a person may repel an attack without being criminally liable for injury necessarily inflicted in doing so.[49]

It will hereafter be seen that a person who causes another's death by culpable negligence—as, for instance, by careless driving—is guilty of manslaughter. In such cases contributory negligence on the part of the deceased is not a defense;[50] nor is negligence on the part of a person wounded in caring for himself, although it contributes to his death, a defense in favor of one charged with causing the death.[51]

Mental Element in Torts and Crimes.

Still another distinction between crimes and torts is in the fact that, to render one criminally liable for an act, the law requires that he shall have had a criminal intent, so that a lunatic or a very young child, not being able to entertain such an intent, is incapable of committing crime, while it is otherwise in case of torts, where the person injured seeks redress. You may recover damages from a lunatic, or an infant under seven years of age, for a wrong, but cannot prosecute him criminally.[52]

Crime may be One of Omission.

As stated in the definition, a crime may be one of omission, or, in other words, a person may commit a crime by remaining perfectly passive when the law requires him to act. Thus, a public officer charged with the duty of rescuing bathers in case of need commits a crime if he neglects to render assistance, and a person, because of the neglect,

[48] Anonymous, 1 Cox, Cr. Cas. 250.

[49] Post, pp. 166, 240. [50] Post, p. 210. [51] Post, p. 156.

[52] Post, p. 58 et seq. And see Cooley, Torts (2d Ed.) p. 97.

is drowned; and a father is guilty of a crime if, though able to do so, he fails to furnish food to a child who is dependent upon him, and who dies from the neglect.[53] So, also, a public officer is liable to indictment for neglect of duty.[54] Hereafter, as in previous sections, acts only will be mentioned, except where it is necessary to speak particularly of omissions; but in most cases the term "act" will be intended to include omission to act where the law requires action.

Punishability not an Absolute Test.

The mere fact that a forbidden act is punishable does not of itself make the act a crime, and it cannot be said without more that a crime is an act forbidden under pain of punishment. You must go further, and look at the object of the punishment, and the nature of the proceeding in which it is inflicted. The punishment must be inflicted on the ground of injury to the public at large, and by the state. There are a number of private wrongs, such as slander, false imprisonment, prosecution without cause, etc., for which, in case of malice, the law allows the person injured to recover, in a civil action, damages in excess of his actual injury. They are known as "punitive" or "exemplary" damages, and are allowed, as the terms imply, as a punishment and example.[55] So, also, in case of certain penal statutes, such as those prescribing a penalty for unlawful sale of intoxicating liquors, if the penalty is recoverable by indictment in the

[53] Post, p. 209.

[54] Post, p. 391.

[55] The rule allowing punitive damages applies as well to cases where the wrongful acts are within the law for punishment of crimes as to those where they are not. Boetcher v. Staples, 27 Minn. 308, 7 N. W. 263, 38 Am. St. Rep. 295. In an action for assault and battery, that defendant had been punished criminally for the assault is not a bar to recovery of exemplary damages. Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

name of the state, the proceeding is criminal, but, if it is recoverable by an action of debt, the proceeding is civil.[56]

Indictability not an Absolute Test.

Nor can the mere fact that a wrongful act renders one liable to indictment in the name of the state determine absolutely that the act is a crime. You must look at the object of the proceeding, for the state has a right to allow this method for obtaining redress for a private individual. Thus, in some states there are, or formerly were, statutes under which, if a death is caused by the wrongful act of the servants or agents of a corporation, an indictment lies against it to recover a penalty, in the nature of damages, for the benefit of the widow and children of the deceased.[57] It may not be out of place to say also in this connection that, in some of the states, criminals are proceeded against in some cases by information, and not necessarily by indictment.

Mala in Se and Mala Prohibita.

The books make a distinction between crimes which are mala in se, or wrongful from their nature, and punishable at common law, such as murder, robbery, rape, and many lesser offenses, and those that are mala quia prohibita, or wrong merely because prohibited by statute.[58] The distinction is sometimes of practical importance. If an act is prohibited by statute on pain of punishment, the violation of the statute is a crime. Again, an act which is wrong from its very nature, and a crime at common law, may be defined and prohibited by statute; and, as will hereafter be seen, in some states the common law has been abrogated, and no act is a crime unless prohibited by statute.

[56] See 1 Bish. New Cr. Law, § 32, and cases cited.

[57] Pub. St. Mass. c. 112, §§ 212, 213; Tiff. Death Wrong. Act, § 186.

[58] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362.

CHAPTER II.

THE CRIMINAL LAW–HOW PRESCRIBED.

HOW THE CRIMINAL LAW IS PRESCRIBED.

3. The criminal law consists both of statutes, or express enactments of the lawmaking power of the state, and of the common or unwritten law.

THE COMMON LAW.

4. The common law is a body of the law which derives its authority, not from express enactments of the lawmaking power of the state, but from the universal consent and immemorial practice of the people. Its principles have been accepted as the law from time immemorial, and are evidenced by decisions of the courts applying them to particular cases.

(a) The common law of England, so far as it was applicable to the new conditions of the American colonists, together with some old English statutes, was brought with them to this country, and is now the common law with us, except so far as it has been modified or superseded by statutes.

(b) There are no crimes against the United States government by virtue of the common law ex proprio vigore.

The Common Law Defined and Explained.

The common law, in the sense in which it is here used, is a body of the law, the source of which is not known, which derives its authority, not from express enactments of the legislative power, like the statute law, but from the fact that it has existed and been accepted as the law from time im-

memorial. It is preserved and evidenced by judgments of the courts applying it to particular cases as they arise. As said by Sir James Stephen: "It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the state. Indeed, even in our own time and country that conception of it is gaining ground very slowly. An earlier, and to some extent a still prevailing, view of it is that it is more like an art or science, the principles of which are at first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances. Somehow, no one can say precisely how, though more or less plausible and instructive conjectures upon the subject may be made, certain principles came to be accepted as the law of the land. The judges held themselves bound to decide the cases which came before them according to those principles, and, as new combinations of circumstances threw light on the way in which they operated, the principles were, in such cases, more and more fully developed and qualified, and, in others, evaded or practically set at naught and repealed. Thus, in order to ascertain what the principle is at any given moment, it is necessary to compare together a number of decided cases, and to deduce from them the principle which they establish." [1] This law is spoken of as the unwritten law, or lex non scripta, to distinguish it from the statutory law. The common law is in fact unwritten, though it is evidenced by writing. A decision and judgment of a court declaring a principle of law, and applying it to a particular case, is reduced to writing, and published in the Reports, but the written report is not the law, nor does the law derive its authority from the fact that the decision is written. The report is merely evidence of the law,—a written account of the application to

§§ 3-4. [1] Steph. Cr. Law, Introduction, viii.

a particular case of a principle of law which is still unwritten.[2]

The Common Law in the United States.

When our country was settled, the colonists from England brought with them so much of the common law of the mother country, and such acts of parliament, as were applicable to their new condition and surroundings, and this law became the common law of the original colonies, and of the new settlements as the colonies extended, and remained with them when they became independent states. In some of the states this body of law was expressly adopted by the constitution or by statutes. In a Massachusetts case it is said: "Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes passed since the emigration were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages originating probably from laws passed by the legislature of the colony of the Massachusetts Bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people." [3] Texas, though originally governed

[2] 1 Bl. Comm. 63 et seq.; Com. v. Chapman, 13 Metc. (Mass.) 68, a good illustrative case.

[3] Com. v. Knowlton, 2 Mass. 530; 1 Kent, Comm. 470. And see Com. v. Churchill, 2 Metc. (Mass.) 118; Com. v. Leach, 1 Mass. 59;

by the civil law derived from Mexico, afterwards adopted the common law. In Louisiana the statute, after defining crimes, provides that "all crimes, offenses, and misdemeanors shall be taken, intended, and construed according to and in conformity with the common law of England." It may be said now that, except where it has been changed by statute, the common law of England, so far as it is applicable, and some of the old English statutes, are the common law in all of the United States,[4] except that in some few states, where the statutes are intended to cover the whole field, the common law applies only for the purpose of construing them, and to the procedure.

English Common-Law Authority not Essential.

Although our common law was thus brought with our ancestors from England, it will be found that there are common-law crimes with us for which there can be found no direct authority in the English decisions. The reason of this is partly in the difference between the institutions in the two countries, and partly in the fact that certain acts were covered by statutes in England when they first required notice, and have been punished under the statutes, instead of under the common law. The fact, therefore, that there is no common-law authority in England for declaring an act a crime, does not determine that it is not a common-law crime with us. In England, where they have an established church, adultery and other acts of lewdness were

Com. v. Warren, 6 Mass. 72, 73; Com. v. Chapman, 13 Metc. (Mass.) 68.

[4] Com. v. Callaghan, 2 Va. Cas. 460; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; Stuart v. People, 3 Scam. (Ill.) 395; Sans v. People, 3 Gilman (Ill.) 327; Dawson v. Coffman, 28 Ind. 220; State v. Pulle, 12 Minn. 164 (Gil. 99); Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; In re Lamphere, 61 Mich. 105, 27 N. W. 882.

punished exclusively in the ecclesiastical courts, and therefore we can find no cases in which they were punished under the common law. In some of our states adultery has been held a common-law crime. Other states, on the contrary, have refused to so hold, and have left it to the church tribunals.[5] So, also, in England there have been, since an early day, penal statutes covering almost every kind of malicious injury to property, and there are therefore few cases in which malicious mischief has been there punished at common law. It is, however, a well-settled principle of the common law that all acts tending to a breach of the public peace are crimes, and we have many cases in which acts of malicious mischief have been punished as common-law crimes.[6] Whether or not, therefore, an act is a common-law crime with us, does not necessarily depend on the existence of common-law authority in England.[7]

The Common Law Prohibits as Well as Punishes.

It will be noticed that in the definition of crime it was said to be an act "prohibited" by law. This feature of the definition has been objected to, on the ground that it is inadequate where the common law is recognized, because the common law determines from the reason of the thing that a particular act is a crime. The common law, however, does prohibit. To say otherwise would be to say that the common law makes an act punishable which was not against the law when it was committed, and no civilized nation would punish such acts. The common law says that no one shall commit murder, robbery, rape, etc., and that, if he does so, he will be punished. This prohibition is evidenced by the judicial decisions, and, furthermore, is written in the heart and conscience of every mentally responsible

[5] Post, p. 358. [6] Post, pp. 331, 396.

[7] 1 Whart. Cr. Law, §§ 16–19.

human being. There are acts, it is true, which may never before have been committed, but which, when they are committed, may be punished. They will not be punished, however, unless they violate the general principles of the common law, and unless they are mala in se, or wrong in themselves. The common law punishes acts tending to a breach of the public peace, acts injurious to the public health and comfort, acts injurious to the public morals, and acts having certain other tendencies. Any acts, therefore, which have such effect, are prohibited by the common law. The fact that a man does not know what the general sanctions of the common law prohibit is immaterial, for he is presumed to know the law, and ignorance is no excuse.[8] There is certainly no hardship in this so far as the common law is concerned, for it only punishes acts which are mala in se, or wrong in their very nature, and which are therefore contrary to the dictates of conscience. The hardship, if any, is in case of the statute law, where it prohibits an act which is only wrong because of the statute. Even here ignorance of the statute is no excuse for violating it.

Morality and Christianity.

Morality and the teachings of Christianity have had an influence in the formation of the common law, as well as on legislators. They may be the cause of an act being prohibited by the common law or by statute, but an act is not a crime simply because it is immoral, nor because it is contrary to the doctrines of Christianity. It is true that an act is a crime if it shocks the moral sense of the community, and creates a public scandal, but this is because of the injury to the public. The same act which would be a crime if done in public is not punished at all if done in private, though it is none the less immoral. Some of

[8] Post, p. 80.

the writers on criminal law make the broad assertion that Christianity is a part of our common law, and there are statements to the same effect by some of the judges;[9] but the assertion is too broad. No court in this country would punish a man because he does not believe in the doctrines of Christianity, or because he argues against the truth of Christianity. Our constitution expressly declares that no man's religious liberty shall be interfered with, and a man is free in this country, as far as the law is concerned, to worship Mohammed or the sun, without being liable to punishment. The comfort, the peace, and the morals of the community are protected by the common law, and it punishes acts which have a tendency to injure them, but it does not interfere with one's religious views. Disturbance of a church meeting is a common-law crime, but this is because of the breach of the public peace, and not because of the religious character of the meeting, for disturbance of an assemblage to argue against Christianity is equally a crime. A person may shut himself up in a room and blaspheme without being amenable to punishment; but, if he blasphemes in a public place, it is otherwise. This is not because of the sin, but because the blasphemy is a public nuisance, or because it tends to a breach of the public peace.[10]

[9] 1 Bish. New Cr. Law, § 497; May, Cr. Law, § 43; Updegraph v. Com., 11 Serg. & R. (Pa.) 394; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Vidal v. Girard, 2 How. 127, 11 L. Ed. 205.

[10] 1 Whart. Cr. Law, § 20, citing Cooley, Const. Lim. 472; 13 Alb. Law J. 366; 20 Alb. Law J. 265, 285; Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Chapman v. Gillet, 2 Conn. 40; Lindenmuller v. People, 33 Barb. (N. Y.) 548; Com. v. Jeandell, 2 Grant, Cas. (Pa.) 506; People v. Porter, 2 Parker, Cr. R. (N. Y.) 14; Bloom v. Richards, 2 Ohio St. 387; Board of Education of City of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637. And see People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Com. v. Kneeland, 20 Pick. (Mass.) 206. Post, p. 348.

No Common-Law Crimes against the United States.

There are no common-law crimes against the United States, either within state limits or within territory within the exclusive jurisdiction of the United States. It can punish no offenses that have not been expressly defined, and made punishable by an act of congress.[11]

STATUTES—POWERS OF STATE AND FEDERAL LEGISLATURES.

5. The state legislatures can punish any act unless restricted by the state or federal constitution.

6. The United States congress has no power to declare and punish crimes except such as is derived from the federal constitution.

Statutory Crimes.

In addition to crimes at common law, there are statutory crimes; that is, acts declared criminal by express enactments of the lawmaking power. After the legislature expressly prohibits an act, and makes it a crime, there is no longer any test of public policy to be applied. The legislature has presumably enacted the law for the public good, and the courts cannot look further into its propriety than to ascertain whether the legislature had the power to pass it.[1]

Same—Power of the State Legislatures.

The legislatures of the different states have the inherent power to prohibit and punish any act, provided they do not violate the restrictions of the state and federal constitutions.

[11] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; 1 Kent, Comm. 331. See, also, post, p. 425 et seq.

§§ 5–6. [1] Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Parker v. State, 132 Ind. 419, 31 N. E. 1114.

Same—Power of the United States Congress.

The United States congress also has power to a certain extent to define and punish crimes, but it has only such power as is expressly or by implication conferred by the federal constitution.[2] Unlike the state legislatures, it has no inherent power.[3]

Same—The Powers Conferred on Congress by the Constitution.

The constitution gives congress the power to regulate commerce with foreign nations and between the several states;[4] to provide for the punishment of counterfeiting the securities and current coin of the United States; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;[5] to make rules for the government and regulation of the land and naval forces; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States,

[2] Post, p. 425.

[3] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; U. S. v. Coolidge, 1 Wheat. 415, 4 L. Ed. 124.

[4] This provision prevents the states from passing any penal statute interfering with commerce. State v. Pratt, 59 Vt. 590, 9 Atl. 556; In re Kimmel (D. C.) 41 Fed. 775; Ex parte Thomas, 71 Cal. 204, 12 Pac. 53; Com. v. Gardner, 133 Pa. 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. Rep. 645; Territory v. Evans, 2 Idaho, 634, 23 Pac. 115, 7 L. R. A. 288; In re Rebman (C. C.) 41 Fed. 867; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Ex parte Kieffer (C. C.) 40 Fed. 399.

[5] Congress may punish, as an offense against the law of nations, counterfeiting in United States of notes of foreign banks. U. S. v. Arjona, 120 U. S. 479, 7 Sup. Ct. 628, 30 L. Ed. 728.

and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and, finally, to make all laws which shall be necessary and proper for carrying into execution the powers given it, and all other powers, vested by the constitution in the government of the United States, or in any department or officer thereof.[6] Congress is also given power to enforce, by appropriate legislation, the prohibition against slavery or involuntary servitude in the United States,[7] and to punish treason.[8]

Same—Express Restrictions of the Federal Constitution.

To give the student a general idea of the constitutional provisions bearing on the criminal law, including questions of procedure, it will be well to show the restrictions laid down by the constitution. They do not apply, however, to the states, except where it is so expressed.[9] Thus, it is provided that the trial of all crimes, except in cases of impeachment, shall be by jury, and shall be held in the state where the crime was committed.[10] The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and describing the place to be searched and the persons or things to be seized.[11] No person can be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, ex-

[6] Const. U. S. art. 1, § 8.

[7] Id. Amend. art. 13.

[8] Const. U. S. art. 3, § 3.

[9] Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; Boyd v. Ellis, 11 Iowa, 97.

[10] Const. U. S. art. 3, § 2.

[11] Amend. art. 4.

cept in certain cases; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.[12] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses for him; and to have the assistance of counsel for his defense.[13] Excessive bail cannot be required, nor excessive fines imposed, nor cruel and inhuman punishments inflicted.[14] No state can make any law or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor can any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[15] It will be observed that the foregoing provisions, except the last, have reference only to powers exercised by the government of the United States, and not to those of the states.[16]

Same—Power of Territorial Legislatures.

The federal constitution provides that congress shall have full power to make all needful rules and regulations respecting the territory and other property belonging to the United States,[17] but the general and plenary control of congress

12 Id. art. 5.
13 Id. art. 6.
14 Id. art. 8.
15 Id. art. 14. § 1.
16 Eilenbecker v. District Court, supra.
17 Const. U. S. art. 4, § 3.

over the territories arises not merely from this grant of power, but also from the right of the national government to acquire territory, flowing from the power to declare war and make treaties.[18] As a general rule, congress has seen fit to invest the people of the territories with a certain measure of self-government by authorizing the election of legislative assemblies possessing general power of legislation. The plenary control of congress extends to the acts of such legislatures.[19] They may make any laws on proper subjects of legislation, not in conflict with the federal constitution, the organic act, and other laws of congress.[20] It has hitherto been customary to extend the provisions of the constitution over the territories by the organic acts creating them. How far the limitations and guaranties of the constitution apply ex proprio vigore to the territories is a question which has not been determined.[21]

[18] Mormon Church v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481; American Ins. Co. v. Canter, 1 Pet. 511, 7 L. Ed. 242; U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. See Black, Const. Law, 19, 115, 207.

[19] First Nat. Bank of Brunswick v. Yankton Co., 101 U. S. 129, 25 L. Ed. 1046.

[20] Miners' Bank of Dubuque v. Iowa, 12 How. 1, 13 L. Ed. 867; Trustees of Vincennes University v. Indiana, 14 How. 268, 14 L. Ed. 416; Ferris v. Higley, 20 Wall. 375, 22 L. Ed. 383; American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; City of Springfield v. Thomas, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; Territory v. Doty, 1 Pin. (Wis.) 396; Smith v. Odell, Id. 449; Swan v. Williams, 2 Mich. 427.

[21] Downes v. Bidwell, 182 U. S. 244, 277, 297, 358, 382, 21 Sup. Ct. 770, 45 L. Ed. 1088. See, also, De Lima v. Same, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041.

Same—Ex Post Facto Laws are Unconstitutional and Void.[22]

The constitution of the United States prohibits congress or any state from passing an ex post facto law, and there are similar provisions in the state constitutions. Such a law is one passed after the commission of an act which changes the legal consequences of the act to the wrongdoer's prejudice.[23] The term includes (1) every law which makes an act committed before its passage, and which was innocent when done, criminal, and punishes it; (2) or which aggravates a crime, and makes it greater than when committed; (3) or which changes the punishment, and inflicts a greater or different punishment;[24] (4) or which changes the rules of evidence so that less or different testimony is sufficient to convict than was required when the act was com-

[22] Const. U. S. art. 1, §§ 9, 10. See Whart. Cr. Law, §§ 29, 30, and notes; Bish. St. Crimes, §§ 29, 85, 180, 185, 265–267; Black, Law Dict. tit. "Ex post Facto Law."

[23] For definition see Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.

[24] Change of punishment from death to imprisonment until governor shall issue his warrant, and then death, Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; and see Ratsky v. People, 29 N. Y. 124, and In re Petty, 22 Kan. 477; from death to imprisonment for life, Shepherd v. People, 25 N. Y. 406; contra, Com. v. Wyman, 12 Cush. (Mass.) 237; Com. v. Gardner, 11 Gray (Mass.) 438; from death to imprisonment for life or death, in discretion of jury, Marion v. State, 16 Neb. 349, 20 N. W. 289; reducing rate per diem allowed convict working out fine, Ex parte Hunt, 28 Tex. App. 361, 13 S. W. 145; reducing maximum, and adding minimum, fine and imprisonment, Flaherty v. Thomas, 12 Allen (Mass.) 428; Com. v. McDonough, 13 Allen (Mass.) 581; changing from imprisonment to fine or imprisonment, State v. McDonald, 20 Minn. 136 (Gil. 119); changing character of imprisonment and mode of executing death sentence, In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; People v. McNulty (Cal.) 28 Pac. 816; changes of mode not affecting sub-

mitted.[25] A statute is not within the prohibition if it makes the act a less aggravated crime than when committed, and makes the punishment less severe, or if it merely changes the method of procedure,[26] unless it thereby deprives the accused of a substantial right which is vital for his protection.[27]

stantial rights of prisoner, In re Tyson, 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472; Holden v. Minnesota, 137 U. S. 483, 11 Sup. Ct. 143, 42 L. Ed. 780. Statutes relating to penal administration or prison discipline, even though enhancing the severity of the confinement, are not objectionable. Murphy v. Com., 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266. Indeterminate sentence law not ex post facto. Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322.

A statute is not ex post facto which imposes an increased punishment for second offense where first offense was committed before its enactment. McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; Com. v. Marchand, 155 Mass. 8, 29 N. E. 578; Com. v. Graves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Rand v. Com., 9 Grat. (Va.) 738; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; In re Kline, 6 Ohio Cir. Ct. R. 215. Nor is law ex post facto changing from imprisonment for not less than two nor more than ten years to a term not to exceed ten years. People v. Hayes, 70 Hun, 111, 24 N. Y. Supp. 194.

[25] State v. Johnson, 12 Minn. 477 (Gil. 378), 93 Am. Dec. 241, changing the rule requiring direct evidence of both marriages in bigamy, and permitting indirect evidence. See, also, Calder v. Bull, supra; Cummings v. Missouri, 4 Wall. 325, 18 L. Ed. 356.

[26] What is procedure, review of cases, and history of ex post facto clause. Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. Law amending statute of limitations to allow prosecution is ex post facto, State v. Moore, 42 N. J. Law, 208; but law changing court

[27] It was incompetent for the state of Utah on its admission to provide that persons charged with felony committed while it was a territory should be tried by a jury of eight. Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. See, also, Duncan v. Missouri, 152 U. S. 378, 14 Sup. Ct. 570, 38 L. Ed. 485.

Construction of Statutes.

The rule is that penal statutes are to be construed strictly against the state, and in favor of the accused; but the words must be given their full meaning, and the courts will not strain the context and look for a meaning which may have the effect of declaring the statute of no effect.[28] The

or organization of court is not, State v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181; Com. v. Phillips, 11 Pick. (Mass.) 28; State v. Jackson, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829; State v. Welch, 65 Vt. 50, 25 Atl. 900; nor is a law changing place of trial, Cook v. U. S., 138 U. S. 183, 11 Sup. Ct. 275, 34 L. Ed. 906; nor where it merely allows attorney's fee in action to abate liquor nuisance, as this pertains to costs and procedure, Farley v. Geisheker, 78 Iowa, 453, 43 N. W. 279, 6 L. R. A. 533; nor changing requirements as to pleadings, Perry v. State, 87 Ala. 30, 6 South. 425; nor limiting jury to determination of facts, instead of being judges of law and facts, Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; nor enlarging class of persons competent as witnesses, Hopt v. People, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Mrous v. State, 31 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834; nor changing the qualifications of jurors, Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; nor reducing the number of defendant's peremptory challenges, South v. State, 86 Ala. 617, 6 South. 52; Mathis v. State, 31 Fla. 291, 12 South. 681; nor allowing the state peremptory challenges, Walter v. People, 32 N. Y. 147; nor increasing number, State v. Ryan, 13 Minn. 370 (Gil. 343); nor abolishing indictment by grand jury and substituting information, Lybarger v. State, 2 Wash. St. 552, 27 Pac. 449, 1029; State v. Hoyt, 4 Wash. 818, 30 Pac. 1060; In re Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94; but, contra, McCarty v. State, 1 Wash. St. 377, 25 Pac. 299, 22 Am. St. Rep. 152; State v. Kingsly, 10 Mont. 537, 26 Pac. 1066; nor changing the number of grand jurors, State v. Ah Jim, 9 Mont. 167, 23 Pac. 76.

[28] U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; U. S. v. Morris, 14 Pet. 475, 10 L. Ed. 543; U. S. v. Hartwell, 6 Wall. 385, 18 L. Ed. 830; Gibbons v. People, 33 Ill. 443; Steel v. State, 26 Ind. 82; People v. Plumsted, 2 Mich. 465; People v. Reynolds, 71 Mich. 343, 38 N. W. 923; People v. Reilly, 50 Mich. 384, 15 N. W. 520, 45 Am.

rule of strict construction only applies to that portion of the statute which defines the offense and prescribes the punishment. In construing statutes, the intention of the legislature is to be sought, and for this purpose the court will consider, not only the act itself, but its preamble, and will also look into similar statutes on the same subject, and particularly into the old law and into the mischief intended to be remedied.[29] All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly.[30] In some of the states there are statutory provisions as to construction of statutes.[31]

Common Law in Connection with Statutes.

In all of the states statutes have been passed defining and punishing particular crimes, and the question arises as to what effect this has on the common law. Sometimes the statute merely declares what was already the common law. In this case all the rules and decisions under the common law are applicable. Again, a statute may change the common law by prescribing new elements as essential to constitute the crime, or by rendering unnecessary certain elements which the common law required. In such case, of course, the statute is to control, but it is to be strictly construed. Statutes in derogation of the common law cannot

Rep. 47; State v. Lovell, 23 Iowa, 304; Keller v. State, 11 Md. 536, 69 Am. Dec. 226; Road Commission v. Haring, 55 N. J. Law, 327, 26 Atl. 915; In re Coy (C. C.) 31 Fed. 800; In re McDonough (D. C.) 49 Fed. 360.

[29] Gibbons v. People, 33 Ill. 443; State v. Babcock, 21 Neb. 599, 33 N. W. 247; State v. Sherman, 46 Iowa, 415; People v. Plumsted, 2 Mich. 465; People v. McKinney, 10 Mich. 54.

[30] See following section and cases cited.

[31] Pen. Code Minn. § 9, abolishes the rule, as to the Code, that a penal statute is to be strictly construed.

be extended beyond their express provisions. A statute creating a crime in general terms, while it may supersede the common law as to the definition of the crime, will be construed in connection with the common-law exemptions from responsibility of persons not having at the time of committing the act the criminal intent required by the common law, such as infants, insane persons, married women, and persons under necessity or under mistake of fact.[32] So, also, a general statute, containing nothing to show a contrary intent on the part of the legislature, must be construed in reference to the common law as to principals and accessaries.[33] A statute may also prohibit an act or impose a public duty without prescribing any punishment or mode of procedure for its violation, and in such a case the common-law punishment and procedure by indictment apply.[34] Any attempt to commit a crime being a misdemeanor at common law, where a statute defines a crime, but makes no provision for attempts, an attempt to commit the crime is punishable under the common law, provided, however, that the subject of attempts is not entirely regulated by statute. In all cases, however, the plain and express terms of a statute must control. The rule is that, unless there is a repugnancy between the statute and the common law, the latter is not repealed,[35] and there are numerous cases where an

[32] Bish. St. Crimes, § 131 et seq.; Rex v. Grombridge, 7 Car. & P. 582; Wilbur v. Crane, 13 Pick. (Mass.) 289, 290; Com. v. Knox, 6 Mass. 76; State v. Martindale, 1 Bailey (S. C.) 163; Duncan v. State, 7 Humph. (Tenn.) 148.

[33] Com. v. Carter, 94 Ky. 527, 23 S. W. 344; Bish. St. Crimes, §§ 135, 136, 139.

[34] 1 Bl. Comm. 122; Com. v. Chapman, 13 Metc. (Mass.) 68; State v. Fletcher, 5 N. H. 257; Keller v. State, 11 Md. 525, 69 Am. Dec. 226.

[35] Shannon v. People, 5 Mich. 71; State v. Pulle, 12 Minn. 164 (Gil. 99). But the legislature may extend the common-law definition of

indictment defectively drawn under a particular statute has been held good as a common-law indictment. But a statute punishing an act which was a crime at common law, and covering the whole subject, supersedes, and by necessary implication repeals, the provisions of the common law on the same subject.[36] Where a statute merely punishes a crime, calling it by name, but not defining it, the common law supplies the definition.[37]

Same—Penal Codes.

Many of the states have adopted penal or criminal codes, the purpose of which is to define what acts shall be punished as crimes. In some of them the code is intended to cover the whole law, and no act is a crime unless it is expressly declared so.[38] In others the code does not entirely abrogate the common law in so far as it makes acts crimes, but merely abrogates it as to the acts expressly prohibited, leaving the common law where it is not so supplanted still in force.[39] Thus, in Ohio and Iowa, it is held that there are no common-law crimes; that no act, however injurious, is a crime unless it is expressly prohibited by statute;[40] and it was held in Ohio that a man who attempted to have carnal knowledge of a girl under ten years of age, with her

a particular offense so as to include acts not punishable at common law, and not embraced within the common law definition. People v. Most, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458.

[36] Com. v. Cooley, 10 Pick. (Mass.) 37.

[37] Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Pitcher v. People, 16 Mich. 142; Benson v. State, 5 Minn. 19 (Gil. 6); U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Smith v. State, 58 Neb. 531, 78 N. W. 1059.

[38] State v. Shaw, 39 Minn. 153, 39 N. W. 305.

[39] Johnson v. People, 22 Ill. 314; State v. Pulle, 12 Minn. 164 (Gil. 99).

[40] Estes v. Carter, 10 Iowa, 400; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; Allen v. State, 10 Ohio St. 287.

consent, was not guilty of a crime, because there was no statute against it;[41] and the Iowa court held sodomy no crime.[42] In Indiana, there is a statute declaring that "crimes and misdemeanors shall be defined, and the punishment thereof fixed, by statutes of this state, and not otherwise."[43] Even in those states, however, which have penal codes, and which do not recognize common-law crimes, the common law is in force to the extent that it may be resorted to for the definition of crimes which are not defined in the statutes prohibiting them.[44]

Repeal of Statute—Revival of Former Law.

It is a maxim of the common law applicable to the construction of statutes that the simple repeal of a repealing law, not substituting other provisions in place of those repealed, revives the pre-existing law, unless the repealing act or some general statute makes a different rule.[45] Accordingly, an act committed in violation of the pre-existing law and after the repeal of the repealing law may be punished, although, if it were committed before such repeal, it could not be punished, since the pre-existing law would not then be in force.[46]

Municipal Ordinances.

Cities and other municipal bodies are generally vested by the legislature with power to enact ordinances against dis-

[41] Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355.

[42] Estes v. Carter, 10 Iowa, 400.

[43] Jones v. State, 59 Ind. 229.

[44] State v. Twogood, 7 Iowa, 252; Estes v. Carter, 10 Iowa, 400; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355.

[45] Com. v. Churchill, 2 Metc. (Mass.) 118; Com. v. Mott, 21 Pick. (Mass.) 492; U. S. v. Philbrick, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. Ed. 559.

[46] Ante, p. 3.

orderly houses, gambling houses, and the like, as well as to regulate many other matters for the welfare of the community, for a violation of which a penalty by fine or imprisonment is attached as a punishment. Great diversity of opinion exists as to whether acts in violation of municipal ordinances are criminal offenses or crimes. By many courts it is held or declared that they are not crimes, as not being violations of public law.[47] By a few courts it is held—and, it seems, with better reason—that they are crimes, being breaches of law established for the protection of the public, as distinguished from infringements of private rights.[48] "A municipal ordinance is as much a law for the protection of the public as a criminal statute of the state, the only difference being that the one is designed for the protection of the municipality and the other for the protection of the whole state; and in both cases alike the punishment is imposed for a violation of a public law. If the state itself directly should make the act an offense, and prescribe the punishment, there could be no question that the act would be a 'crime' and the prosecution a 'criminal prosecution'; * * * and how can it make any difference, either in the intrinsic nature of the thing or in the consequences to the accused, whether the state does this itself or delegates the power to pass the law to the municipal

[47] City of Greeley v. Hamman, 12 Colo. 94, 20 Pac. 1; State v. Rouch, 47 Ohio St. 478, 25 N. E. 59; City of Oshkosh v. Schwartz, 55 Wis. 487, 13 N. W. 552; City of Kansas v. Clark, 68 Mo. 588; Same v. Neal, 122 Mo. 232, 26 S. W. 695; State v. Heuchert, 42 La. Ann. 270, 7 South. 329; State v. Boneil, 42 La. Ann. 1110, 8 South. 299, 10 L. R. A. 60, 21 Am. St. Rep. 413. And see cases cited note 53 infra.

[48] State v. West, 42 Minn. 147, 43 N. W. 845; Jaquith v. Royce, 42 Iowa. 406; State v. Vail, 57 Iowa, 103, 10 N. W. 297; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

authorities?" [49] The decision of the question has sometimes turned on the construction of the peculiar language of the constitution or of a statute.[50]

The question has frequently been considered in cases involving the right of the accused to a trial by jury, but denial of the right does not necessarily involve a determination that the offense is not criminal, since at common law a person accused of a petty offense of this nature, of which justices of the peace and police magistrates had jurisdiction, had no right to a trial by jury; and it is generally held that the constitutional guaranty is no broader than the common-law right.[51] Again, the question has been much considered in cases involving the determination of whether the constitutional provisions against double jeopardy apply to prevent two prosecutions for the same act, the one in violation of a municipal ordinance prohibiting it, and the other under a state statute. If the offense against the ordinance is a criminal offense, it would follow logically that the same act may not be punished under both ordinance and statute; and there are decisions to that effect.[52] The opposite conclu-

[49] Per Mitchell, J., in State v. West, supra. But see State v. Robitshek, 60 Minn. 123, 125, 61 N. W. 1023, 33 L. R. A. 33.

[50] Bish. New Cr. Law, § 32. "Crime," as used in the Code of Criminal Procedure, does not include petty offenses subject to summary convictions by a magistrate. Steinert v. Sobey, 14 App. Div. 505, 44 N. Y. Supp. 146.

[51] State v. West, supra; City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; State v. Glenn, 54 Md. 573; State v. Conlin, 27 Vt. 318; Byers v. Com., 42 Pa. 89; McGear v. Woodruff, 33 N. J. Law, 213; People v. Justices, 74 N. Y. 406; Inwood v. State, 42 Ohio St. 186; Wong v. City of Astoria, 13 Or. 538, 11 Pac. 295.

[52] State v. Thornton, 37 Mo. 360; Hankins v. People, 106 Ill. 628.

sion, however, has more frequently been reached; the two offenses being declared to be distinct.[53]

[53] Ambrose v. State, 6 Ind. 351; Levy v. State, Id. 281; State v. Lee, 29 Minn. 445, 13 N. W. 913; State v. Fourcade, 45 La. Ann. 717, 13 South. 187, 40 Am. St. Rep. 249; State v. Clifford, 45 La. Ann. 980, 13 South. 281; State v. Stevens, 114 N. C. 873, 19 S. E. 861; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; Koch v. State, 53 Ohio St. 433, 41 N. E. 689; City of Yankton v. Douglass, 8 S. D. 441, 66 N. W. 923; Ex parte Hong Sheu, 98 Cal. 681, 33 Pac. 799; State v. Gustin, 152 Mo. 108, 53 S. W. 421.

CHAPTER III.

CLASSIFICATION OF CRIMES.

HOW CLASSIFIED.

7. Crimes, at common law, are divided into—
(a) Treason.
(b) Felonies, and
(c) Misdemeanors.

TREASON.

8. In this country treason can consist only in levying war against the United States, or a particular state, or in adhering to their enemies, giving them aid and comfort.

Under the old English common law, treason was divided into high and petit treason, the former consisting in certain acts against the sovereign, and the latter in the murder of a superior by an inferior; that is, of a husband by his wife, a master by his servant, or a lord or ordinary by an inferior ecclesiastic.[1] There is no longer such a crime as petit treason, the offense being regarded simply as homicide. With us the crime of treason is expressly defined by the federal constitution, which declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and com-

§§ 7–8. [1] 4 Bl. Comm. 75.

fort;" [2] and there are similar provisions in the state constitutions. Treason is a specific crime, and will be so treated hereafter.[3]

FELONIES AND MISDEMEANORS.

9. "Felony is any offense which by the statutes or by the common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods, or both, or which a statute expressly declares to be such." [1] In most of the states, the statutes expressly declare all crimes to be felonies which are punishable by death or by imprisonment in the state prison.

10. All crimes less than felonies are misdemeanors.

A felony at common law was any crime which occasioned the forfeiture of lands and goods. This was usually accompanied by capital punishment, though not always; [2] but, as capital punishment was usually inflicted, felonies came to include all crimes punishable by death.[3] There is now, of course, no forfeiture of lands and goods because of crime. Felony is now generally defined by statute, but in states where there is no statutory definition the courts look to the history of the particular offense, and ascertain whether it was regarded as felony at common law, and this although the punishment may be imprisonment, and not death.[4]

[2] Const. U. S. art. 3, § 3, cl. 1.

[3] Post, p. 406.

§§ 9–10. [1] 1 Bish. New Cr. Law, § 615; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550; Com. v. Schall, 12 Pa. Co. Ct. R. 554.

[2] Suicide was felony. Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, so excusable homicide, being accompanied by forfeiture, was a felony.

[3] 4 Bl. Comm. 94.

[4] 1 Bish. New Cr. Law, § 616; State v. Dewer, 65 N. C. 572. Cf. Com. v. Newell, 7 Mass. 245. In the absence of a statute defining "felony" the word is used to designate such serious offenses as were

In many states statutes have been enacted declaring all offenses to be felonies which are punishable by death or by imprisonment in the state prison.[5] Under these statutes, a crime is a felony if it may be punished by imprisonment in the state prison, though it may lie within the discretion of the court or jury to inflict a less punishment,[6] and even though a less punishment is in fact imposed.[7] Where a statute provides that one who violates its provisions shall be deemed to have "feloniously" committed the act, the offense is thereby made a felony; and so, also, if it provides for punishing accessaries, as there can be accessaries in felonies only.[8]

Importance of Distinction.

The distinction between felonies and misdemeanors is an important one, though you will see statements to the contrary in some of the books. It is true that the chief distinction has been abolished in the abolition of attainder and

formerly punished by death, or by forfeiture of lands or goods. Bannon v. U. S., 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494.

[5] Drennan v. People, 10 Mich. 169; State v. Smith, 8 Blackf. (Ind.) 489; Nichols v. State, 35 Wis. 308; Smith v. State, 33 Me. 48, 54 Am. Dec. 607. Under Code, § 1097, providing that for misdemeanors done with deceit and intent to defraud the offender may be punished by imprisonment in the penitentiary, and a later act making all offenses so punishable felonies, a conspiracy to cheat and defraud, being committed with deceit and so punishable, is a felony. State v. Mallett, 125 N. C. 718, 34 S. E. 651.

[6] Ingram v. State, 7 Mo. 293; State v. Smith, 32 Me. 369, 54 Am. Dec. 578; People v. War, 20 Cal. 117; People v. Park, 41 N. Y. 21; People v. Lyon, 99 N. Y. 210; Randall v. Com., 24 Grat. (Va.) 644; State v. Harr, 38 W. Va. 58, 17 S. E. 794. Contra, Lamkin v. People, 94 Ill. 501.

[7] People v. Hughes, 137 N. Y. 29, 32 N. E. 1105; Benton v. Com., 89 Va. 570, 16 S. E. 725; State v. Melton, 117 Mo. 618, 23 S. W. 889.

[8] Com. v. Barlow, 4 Mass. 439; Com. v. Macomber, 3 Mass. 254.

forfeiture for crime; but, as will be seen as we go further, there are these other distinctions: (1) In felonies there may be accessaries, while in misdemeanors all participants are considered principals.[9] (2) An arrest is justifiable in case of felonies where it would not be in case of a misdemeanor;[10] and the distinction here may be very important,—where, for instance, in a prosecution for murder, the defendant claims that he killed the deceased while he was attempting to make an illegal arrest, an illegal arrest being deemed sufficient provocation to reduce a homicide to manslaughter. (3) In some jurisdictions a prosecution for a felony must be by indictment, while prosecutions for misdemeanors may be by information or complaint.[11] (4) A defendant has rights as to peremptory challenge of jurors on trial for a felony which he has not on trial for misdemeanor.[12] (5) On trial for a felony, the defendant must be present throughout the trial, and the jury cannot separate until after verdict, while this is not the case on trial for a misdemeanor.[13]

[9] Post, p. 100.
[10] Post, pp. 163, 201.
[11] Clark, Cr. Proc. 107.
[12] Clark, Cr. Proc. 449.
[13] Clark, Cr. Proc. 423.

MERGER OF OFFENSES.

11. As a rule, at common law, where a person by the same act commits two crimes, one a felony and the other a misdemeanor, the misdemeanor merges in the felony; but if the crimes are of the same degree, both felonies or misdemeanors, there is no merger.[1]

12. In some states this doctrine has not been recognized, while in most states it has been abolished by statutes allowing conviction of a less offense than is charged in the indictment if it is included in the offense charged.

At common law, on an indictment for felony, there could be no conviction for a misdemeanor, although the offense charged necessarily included the lesser offense.[2] Thus there could be no conviction of simple assault, or of assault with intent to kill or to commit rape (where such aggravated assault was a misdemeanor), on an indictment for murder or manslaughter or for rape.[3] So conspiracy to commit a crime is only a misdemeanor at common law, and where the conspiracy is to commit a misdemeanor only it is not merged in the completed crime; but it is otherwise if the conspiracy is to commit a felony, and the felony is actually committed.[4] The so-called "doctrine of merger" rested on the reason that

§§ 11–12. [1] 1 Bish. New Cr. Law, §§ 787, 788, 804, et seq.

[2] 1 Chit. Cr. Law, 251; 2 Hawk, P. C. c. 47, § 8; Rex v. Westbeer. 1 Leach, 14. 2 Strange, 1133; Rex v. Monteth, 2 Leach, 702; 2 East, P. C. 737, 738; Com. v. Roby, 12 Pick. (Mass.) 496; Com. v. Gable, 7 Serg. & R. (Pa.) 423; Black v. State, 2 Md. 376; Barber v. State, 50 Md. 161. In most of these states the rule has been changed by statute.

[3] Com. v. Roby, supra; Com. v. Cooper, 15 Mass. 187; Com. v. Newell, 7 Mass. 249.

[4] State v. Murray, 15 Me. 100; State v. Mayberry, 48 Me. 218; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Com. v. Kingsbury, 5 Mass. 106, (according to obiter dictum in this case, conspiracy

persons indicted for misdemeanor had certain advantages at the trial,—such as the right to make a full defense by counsel, to have a copy of the indictment, and to have a special jury,—privileges not accorded to a person indicted for felony.[5] The reason for the rule does not exist in the United States, there being no privileges to which the defendant is entitled on a trial for misdemeanor to which he is not entitled on a trial for felony; and many courts have consequently refused to recognize the doctrine that there cannot be a conviction for misdemeanor on indictment for felony.[6] In many states the rule has been changed by statutes which provide that on an indictment, if the proof falls short of the offense charged, but so much of it as constitutes a substantive offense is proved, the defendant may be convicted of any lesser offense included in the offense charged.[7] And it is generally held that when the act charged is a constituent part of some higher offense he cannot object upon conviction that the evidence shows that he is guilty of the higher offense.[8] In some states it is provided by stat-

also merges in misdemeanor;) People v. Mather, 4 Wend. (N. Y.) 229, at page 265, 21 Am. Dec. 122; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; State v. Setter, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121; Com. v. Blackburn, 1 Duv. (Ky.) 4; State v. Noyes, 25 Vt. 415; Berkowitz v. U. S., 35 C. C. A. 379, 93 Fed. 452.

[5] See Clark, Cr. Proc. 358; Whart. Cr. Law, § 279.

[6] People v. Jackson, 3 Hill (N. Y.) 92; State v. Scott, 24 Vt. 127; State v. Shepard, 7 Conn. 54; State v. Johnson, 30 N. J. Law, 185; Hunter v. Com., 79 Pa. 503, 21 Am. Rep. 83; People v. Chalmers, 5 Utah, 201, 14 Pac. 131; Herman v. People, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182.

[7] See Com. v. Drum, 19 Pick. (Mass.) 479; Hill v. State, 53 Ga. 125; State v. Purdie, 67 N. C. 326; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; State v. Kyne, 86 Iowa, 616, 53 N. W. 420; State v. Mueller, 85 Wis. 203, 55 N. W. 165.

[8] State v. Vadnais, 21 Minn. 382; Com. v. Burke, 14 Gray (Mass.) 100; Com. v. Walker, 108 Mass. 309; Com. v. Creadon, 162 Mass. 466,

ute that an indictment for a misdemeanor may be sustained by proof of a felony in which the misdemeanor is included.[9]

38 N. E. 1119; State v. Keeland, 90 Mo. 337, 2 S. W. 442; State v. Grant, 86 Iowa, 216, 53 N. W. 120. But in New York a conspiracy to commit a felony, when executed, merges in the felony, and a prosecution for the felony will not lie. People v. McKane, 7 Misc. Rep. 478, 28 N. Y. Supp. 397; People v. Thorn, 21 Misc. Rep. 130, 47 N. Y. Supp. 46. See, also, People v. Wicks, 11 App. Div. 539, 42 N. Y. Supp. 630; People v. McKane, 143 N. Y. 455, 38 N. E. 950.

[9] People v. Arnold, 46 Mich. 268, 9 N. W. 406; People v. Petheram, 64 Mich. 252, 31 N. W. 188.

CHAPTER IV.

THE MENTAL ELEMENT IN CRIME.

CRIMINAL INTENT.

13. Every common-law crime consists of two elements,—the criminal act or omission, and the mental element, commonly called "criminal intent."

It is a principle of the criminal law that ordinarily a crime is not committed if the mind of the person doing the act in question is innocent. "Actus non facit reum, nisi mens sit rea."[1] Hence it is said that every crime, at least at common law, consists of two elements,—the criminal act or omission, and the mental element, commonly called "criminal intent." The necessity for a guilty mind or criminal intent does not mean that it is necessary that the person doing the prohibited act be conscious that it is wrong, for ignorance of the law is no excuse.[2] It is true, indeed, that most, if not all, acts which are criminal at common law are mala in se, and hence that to a greater or less extent the voluntary commission of the act presupposes a guilty mind. Yet in the case of some of the minor common-law offenses

§ 13. [1] Reg. v. Tolson, 23 Q. B. Div. 168, 172; Chisholm v. Doulton, 22 Q. B. Div. 736.

[2] Post, p. 30.

it can hardly be said that the commission of the act presupposes any such state of mind, except in a purely technical sense; and, if the act is prohibited, the bare intention to commit it is enough to supply the requisite mental element. Again, it is true that at common law ignorance or mistake of fact as a rule exempts from criminal liability if the act done would have been lawful had the facts been as the actor believed; the element of a guilty mind being in such case absent. Yet by statute many acts wrong only because prohibited are made criminal, to which this rule does not apply, it being competent for the legislature to define a crime in such a way as to make the existence of a guilty mind immaterial.[3]

"Malice," although the word is also used in a restricted sense in the definition of particular crimes, such as murder and malicious mischief, is often used synonymously with "criminal intent." Both terms, by reason of the broader meaning given to them in ordinary language, are somewhat misleading. The voluntary doing of an unlawful act is ordinarily sufficient ground on which to raise the presumption of intent, both as to that act and as to any criminal act which is the natural result; and if a man, while acting with a view to one crime, commits another criminal act, which he did not intend, he may frequently be punished for the latter act as a crime. Again, the mental elements of different crimes differ widely; and since a man may be criminally liable for mere negligence, it is even possible for absence of mind to constitute, or to supply the place of, criminal intent.[4] Indeed,

[3] Post, p. 84.

[4] "My view of this subject is based upon a particular application of the doctrine usually, though, I think, not happily, described by the phrase 'Non est reus, nisi mens sit rea.' Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following ground: It

having in view the diverse states of mind which in different crimes are sufficient to constitute the mental element, it is hardly possible to define criminal intent more narrowly than by saying that it is the particular state of mind, differing in different crimes, which, by the definition of the particular crime, must concur with the criminal act. "The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed." [5]

naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a mens rea, or 'guilty mind,' which is always expressly or by necessary implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. Mens rea means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory, indeed, to describe a mere absence of mind as 'mens rea' or 'guilty mind.' The expression, again, is likely to mislead. To an unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; that immorality is essential to crime." Per Stephen, J., in Reg. v. Tolson, supra. Cf. People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, per Cooley, C. J.

[5] Per Stephen, J., Reg. v. Tolson, supra.

MOTIVE NOT INTENT.

14. Motive is not an essential element of crime. A bad motive will not make an act a crime, nor will a good motive prevent an act from being a crime. Motive may, however, tend to show that an act was willful, and done with a criminal intent.

Motive is that which incites or stimulates a person to do an act. Thus the motive may be the desire to injure or to benefit. Motive is never an essential element in a crime. A good motive does not prevent an act from being a crime. It is no less a crime for a man to steal bread to feed his hungry children because the motive is good. If a father neglects to provide medical attendance for a sick child, and the child dies, he is guilty, though he may have been actuated by religious motives, believing that he should depend on prayer and faith.[1] The good motive is no defense.[2] On the other hand, the law does not punish a bad motive. The motive which prompts an act, however bad it may be, does not make the act a crime if the act in itself is not a crime. It was so held where a person obtained goods by making representations which he believed to be false, and which he made with intent to defraud, but which, fortunately for him,

§ 14. [1] Reg. v. Morley, 8 Q. B. Div. 571; Reg. v. Downes, 13 Cox, Cr. Cas. 111. See, contra, the prior case of Reg. v. Wagstaffe, 10 Cox, Cr. Cas. 530.

[2] Removal of mother's corpse from dissenters' burial ground, from filial affection and sense of religious duty. Reg. v. Sharpe, 7 Cox, Cr. Cas. 214. Jew violating Sunday law. Com. v. Has, 122 Mass. 40. Belief of mother who kills her child that it will be better off. People v. Kirby, 2 Parker, Cr. R. (N. Y.) 28. Sending obscene literature through the mails to correct abuses in sexual intercourse. U. S. v. Harmon (D. C.) 45 Fed. 414. Polygamy under religious belief that it is right. Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. See, also, State v. White, 64 N. H. 48, 5 Atl. 828.

turned out to be true.[3] The motive for doing an act may, however, tend to show that the act was committed willfully or premeditatedly, or to prove the intent with which it was committed; and, although it is never essential to prove motive, it may always be proved for this purpose.[4]

GENERAL INTENT—INTENT PRESUMED FROM ACT.

15. Where an act is prohibited on pain of punishment, intention on the part of one capable of entertaining intent, and acting without justification or excuse, to do the act, constitutes criminal intent. In such case the existence of the intent is presumed from commission of the act, on the ground that a person is presumed to intend his voluntary acts and their natural and probable consequences.

Intent does not necessarily involve intention to do a criminal act; but intention to do a criminal act is ordinarily sufficient to constitute criminal intent. In other words, where an act is prohibited on pain of punishment, criminal intent is nothing more than intention to do the act, provided the wrongdoer is a person capable of entertaining criminal intent, and acts without justification or excuse. This is because a man who voluntarily does an act is by law presumed not only to have intended to do the act, but to have intended the natural and ordinary consequences of his act.[1] Thus, if a man strikes another with a deadly weapon, and kills him, he is presumed to have intended to kill him; if he

[3] State v. Asher, 50 Ark. 427, 8 S. W. 177.

[4] Com. v. Hudson, 97 Mass. 565. See Clark, Cr. Proc. 507–509, and cases cited.

§ 15. [1] Rex v. Sheperd, Russ. & R. 170; Reg. v. Doherty, 16 Cox, Cr. Cas. 306; Com. v. Hersey, 2 Allen (Mass.) 173; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; State v. Welch, 21 Minn. 22; State v. Huff, 89 Me. 521, 36 Atl. 1000; Curtis v. State, 118 Ala. 125, 24 South. 111.

throws a deadly missile into a crowded street, and thereby kills another, he is presumed to have intended to kill him; if he administers poison, and death results, he is presumed to have intended that result. On the other hand, a man is not presumed to have intended that which is not the natural result of his act. Thus it was held that there could be no conviction for homicide on evidence that the accused, with his fist, knocked down a man, who was thereupon kicked by a horse and killed.[2] Such cases are to be distinguished from those which hold that the accused is none the less responsible for the death of a person whom he has injured although the injured person might have prevented the fatal result by proper care,[3] such neglect being itself deemed an ordinary and natural consequence of the injury inflicted.[4]

SPECIFIC INTENT.

16. When a crime consists, not merely in doing an act, but in doing it with a specific intent, the existence of that intent is an essential element. In such case the existence of criminal intent is not presumed from the commission of the act, but the specific intent must be proved.

On the other hand, many crimes consist not merely in doing a prohibited act, but in doing an act with a particular state of mind, or specific intent. When, by the common law or by statute, a specific intent is essential to a crime, the specific intent must exist, and must be proved; and consequently is not to be presumed from the mere commission of the act with which it must concur to constitute the crime. Thus burglary is defined as breaking and entering a dwell-

[2] People v. Rockwell, 39 Mich. 503. Cf. Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

[3] Post, p. 156.

[4] Com. v. Hackett, 2 Allen (Mass.) 136.

ing house of another in the nighttime with intent to commit a felony therein, and consequently, if the proof fails to establish the intent to commit a felony, but simply shows an intent to commit a lawful act, or a mere misdemeanor, the crime is not established.[1] So an attempt to commit a crime is itself an offense, but, in order to convict, it must be shown that there was an act done with the specific intent to commit the crime charged as having been attempted.[2] So where a man is charged with assault with intent to commit another crime, as murder or rape, the intent to commit that particular crime must be proved.[3] Again, to constitute the crime of malicious mischief, the mere willful infliction of injury is not enough, but that peculiar state of mind which constitutes "malice" must be shown.[4] Other illustrations of the nature of specific intent will be found under the discussions of particular offenses. It is true that in some cases where the gist of the offense consists in the intent—as in assault with intent to kill or to do great bodily harm—the inference that every man intends the natural and necessary consequences of his acts is entitled to weight, and it would seem that in many cases it would be sufficient to prove the intent.[5] A different view, however, was taken in Michigan, where, on an information for assault with intent to do great bodily harm less than murder, it appeared that such harm was committed by shooting, and it was held that, although

§ 16. [1] Dobb's Case, 2 East, P. C. 513; Rex v. Knight, 2 East, P. C. 510; State v. Moore, 12 N. H. 42; Harvick v. State, 49 Ark. 514, 6 S. W. 19. Post, p. 268.

[2] Post, pp. 126, 136.

[3] Carter v. State, 28 Tex. App. 355, 13 S. W. 147; State v. Butman, 42 N. H. 490; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; Reg. v. Boyce, 1 Moody, Cr. Cas. 29. Post, pp. 136, 137.

[4] Reg. v. Pembliton, 12 Cox, Cr. Cas. 607; Reg. v. Faulkner, 13 Cox, Cr. Cas. 550; Com. v. Walden, 3 Cush. (Mass.) 558.

[5] See cases cited in preceding note.

the presumption arising from the act was an important circumstance in making the proof necessary to show the intent, it was not conclusive, nor alone sufficient, and should be supplemented by other testimony to avoid a reasonable doubt.[6]

CONSTRUCTIVE INTENT.

17. Where a person commits a criminal act while actually intending a different criminal act, which is malum in se, the concurrence of the actual criminal intent with the act committed constitutes that act a crime. The intent in such case is called "constructive intent."

18. Constructive intent will not supply specific intent.

Constructive Intent—Results not Intended.

Where a man does a criminal act while actually intending to do a different criminal act, he may, nevertheless, be criminally liable for the latter act. The actual criminal intent, or guilty mind, concurring with the act actually done, is enough to constitute it a crime. The actual intent is commonly called "constructive intent." Thus it has been said that if a man shot at a fowl with intent to steal it, and accidentally killed a man, he would be guilty of murder.[1] This is an extreme case, and would probably not be followed now. Killing one person, however, in an attempt to kill another, is murder of the person killed;[2] and where several persons cooperate to rob, and while pursuing their object the person assailed is killed, all are guilty of the homicide.[3] So, also, one who attempts to commit suicide, which is a criminal act, and accidentally shoots a person trying to prevent him from

[6] People v. Sweeney, 55 Mich. 586, 22 N. W. 50. See, also, Com. v. Hersey, 2 Allen (Mass.) 173.

§§ 17–18. [1] 1 East, P. C. 265.

[2] In re Saunders, 2 Plowd. 473; In re Gore, 9 Coke, 81; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589.

[3] State v. Barrett, 40 Minn. 77, 41 N. W. 463, post, p. 99.

taking his life, is guilty of manslaughter at least, if not of murder.[4] It has even been held that one who attempts to commit rape, and takes money offered him by the woman, is guilty of robbery.[5] To render one criminally liable for unintended results, however, the act must be malum in se, and not merely malum prohibitum. To run over a person while driving at a speed prohibited by a city ordinance, but not furiously or recklessly, would not render one liable as for criminal assault and battery or homicide, as the excessive speed is only wrong because prohibited by the ordinance.[6] Moreover, the application of the doctrine may be affected by whether or not the intended crime is felony or misdemeanor. Thus, if a person, while engaged in the commission of a felony, unintentionally commits a homicide, he is guilty of murder; but if the crime in which he is engaged be merely a misdemeanor, the unintended homicide is only manslaughter.[7]

Same—Specific Intent.

The doctrine of constructive intent does not apply, however, where a specific intent is necessary to constitute a particular crime. Constructive intent will not supply specific intent. Thus, under a statute enacting that any person who shall unlawfully and "maliciously" commit any damage to property, which was construed as meaning that the act must be willfully and intentionally done, it was held that an indictment for unlawfully and maliciously breaking a window was not sustained by evidence that the accused threw a stone

[4] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

[5] 2 East, P. C. 711. See, also, Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496.

[6] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362. A fortiori, if a mere civil wrong. Reg. v. Franklin, 15 Cox, Cr. Cas. 163.

[7] Post, pp. 191, 204.

at people he had been fighting with, intending to strike one or more of them, but not to break the window; although it was intimated that, had the accused thrown the stone recklessly, knowing there was a window near, which it might probably hit, the conviction might have been sustained on the principle that a man must be taken to intend the natural and probable consequences of his act.[8] Such cases are to be distinguished from others in which, although the criminal act resulting was not intended, the requisite specific intent was yet present when the act was done. Thus, under a statute declaring that whoever shall "unlawfully and maliciously" wound "any person" shall be guilty of a misdemeanor, it was held that a man who, unlawfully and maliciously intending to wound one person, in fact accidentally wounded another, was guilty.[9] So, if a man intending to kill A. strikes B. believing that he is A., the specific intent to strike the person actually struck is sufficient to sustain an indictment for assault with intent to kill B.[10]

INTENT IN CASES OF NEGLIGENCE.

19. In crimes which consist in neglect to observe proper care in performing an act, or in culpable failure to perform a duty, criminal intent consists in the state of mind which necessarily accompanies the negligent act or culpable omission.

In certain crimes the criminal act or omission consists in mere neglect to observe proper caution in the performance of an otherwise lawful act, or in culpable failure to perform a duty imposed by law or by contract, whereby injury results to the public or to an individual. In such cases the criminal

[8] Reg. v. Pembliton, 12 Cox, Cr. Cas. 607. See, also, Reg. v. Faulkner, 13 Cox, Cr. Cas. 550; State v. Mitchell, 27 N. C. 350.

[9] Reg. v. Latimer, 17 Q. B. Div. 359.

[10] McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209.

intent consists simply in the state of mind which necessarily accompanies such negligent act or culpable omission. In other words, as it is frequently put, in some cases criminal intent may be supplied by negligence.

The question of criminal negligence most frequently arises in connection with manslaughter,[1] although it also arises in connection with nuisance,[2] escape,[3] and some other common-law crimes, as well as with many statutory crimes. The subject will be considered more fully in treating of particular offenses.

CONCURRENCE OF ACT AND INTENT.

20. To constitute a crime, act and intent must concur.

It follows from what has been said that, to constitute a crime, both criminal intent and act must concur. The mere doing of the prohibited act without the intent involved in the definition of the particular crime does not constitute the crime. A subsequent criminal intent will not render criminal an act which would have been criminal had it been accompanied by such intent.[1] Thus, in burglary, which consists in breaking and entering with intent to commit a felony, the crime is not committed if the intent is first conceived after entry.[2] So a principal does not make himself criminally liable by ratifying his agent's act.[3] Conversely, the mere intent to do a criminal act, not accompanied by any act, is not a crime. If the intent is accompanied by an act with a view to the commission of the crime, the doer may

§ 19. [1] Post, p. 207.

[2] Post, p. 350.

[3] Post, p. 381.

§ 20. [1] U. S. v. Fox, 95 U. S. 670, 24 L. Ed. 538.

[2] State v. Moore, 12 N. H. 42. Post, p. 268.

[3] Morse v. State, 6 Conn. 9. Cf. Reg. v. Woodward, 9 Cox, Cr. Cas. 95. Post, pp. 117, 118.

be guilty, not, indeed, of the crime intended, but of the crime of attempt.[4] But, if there be no act, there can be no crime. At common law it is no crime merely to have possession of a forged note, or of dies for counterfeiting, though there be an intent to pass the note or use the dies;[5] but it is a crime to procure the note with such an intent, or to procure dies with intent to counterfeit, the procuring being an overt act.[6] So an act may fall short of being a crime by reason of acquiescence for detection on the part of the person against whom the crime is intended, however criminal the intent of the wrongdoer.[7] So, in false pretenses, if the pretense turns out to be true, the crime is not committed, although the accused believed it to be false, and intended to defraud.[8]

[4] Post, p. 126.

[5] Rex v. Heath, Russ. & R. 184; Rex v. Stewart, Id. 287; Dugdale v. Reg., 1 El. & Bl. 435; Com. v. Morse, 2 Mass. 138.

[6] Reg. v. Roberts, 7 Cox, Cr. Cas. 39; Rex v. Fuller, Russ. & R. 308; Dugdale v. Reg., 1 El. & Bl. 435.

[7] Ante, p. 10.

[8] State v. Asher, 50 Ark. 427, 8 S. W. 177; State v. Garris, 98 N. C. 733, 4 S. E. 633. Post, p. 322.

CHAPTER V.

PERSONS CAPABLE OF COMMITTING CRIME, AND EXEMPTIONS FROM RESPONSIBILITY

Criminal Capacity.

Since every crime consists of two elements,—the act, and the mental element, commonly called "criminal intent,"—no person can be guilty of crime unless he has a certain degree of mental capacity. Mental incapacity, which the criminal law recognizes, exists to a greater or less extent in four classes of persons: (1) Infants; (2) lunatics, or insane persons; (3) drunken men; and (4) corporations.

INFANCY.

21. At common law a child under the age of seven years is conclusively presumed incapable of entertaining criminal intent, and cannot commit a crime. Between the ages of seven and fourteen a child is presumed to be incapable, but the presumption may be rebutted. After the age of fourteen, he is presumed to have sufficient capacity, and must affirmatively show the contrary.[1]

§§ 21–22. [1] 4 Bl. Comm. 22; 1 Hale, P. C. 26, 27.

22. In a very few of the states the age of incapacity has been raised by statute, and in some the age at which presumption of capacity begins has been lowered.

The ground of an infant's exemption from criminal responsibility for his acts is the want of sufficient mental capacity to entertain the criminal intent which is an essential element of every crime. If a child, when he commits a wrongful act, is under the age of seven years, not even the clearest evidence, not even his own confession, indeed, will be received on the part of the state, to show that he was of a mischievous discretion. Under that age, he is absolutely irresponsible.[2] If, however, he has reached the age of seven, the state is permitted to prove that he was of sufficient capacity to entertain a criminal intent. In the absence of such proof, he is not responsible, and the proof, to warrant a conviction, must be clear and convincing.[3] It has been held that a conviction cannot be had on his own mere naked confession,[4] but there are cases holding the contrary, where the corpus delicti is otherwise proven.[5] When a child

[2] People v. Townsend, 3 Hill (N. Y.) 479. The statutes in some few states have raised the age of absolute incapacity to ten years. Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132.

[3] Rex v. Owen, 4 Car. & P. 236; Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; State v. Barton, 71 Mo. 288; Wusnig v. State, 33 Tex. 651; State v. Adams, 76 Mo. 355; State v. Fowler, 52 Iowa, 103, 2 N. W. 983. Assault and battery by twelve year old child, State v. Goin, 9 Humph. (Tenn.) 175. See, also, State v. Tice, 90 Mo. 112, 2 S. W. 269; State v. Pugh, 52 N. C. 61; Hill v. State, 63 Ga. 578, 36 Am. Rep. 120. Sale of liquor by child, Com. v. Mead, 10 Allen (Mass.) 398; State v. Nickleson, 45 La. Ann. 1172, 14 South. 134; McCormack v. State, 102 Ala. 156, 15 South. 438; State v. Milholland, 89 Iowa, 5, 56 N. W. 403.

[4] State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592.

[5] State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404. And see Fost. Crown Law, 72; State v. Bostick, 4 Har. (Del.) 563.

has reached the age of fourteen, he is presumed capable of committing crime; and, to escape responsibility, he must affirmatively show want of capacity.[6] In England, a boy of ten years who, after killing a little girl, hid her body, was held criminally liable, because the circumstances showed a mischievous discretion;[7] and a boy of eight years was hanged for arson.[8] In this country, a boy of twelve has been hanged for murder.[9] There are some exceptions to these rules in case of certain crimes of omission, such as negligently permitting felons to escape, failure to repair highways, etc.; infants being held exempt from responsibility, in such case, until they reach the age of twenty-one years, on the ground that until then, not having command of their fortune, they are unable to do these acts as required by law.[10] There is also an exception in the case of rape, arising from a presumption as to the physical capacity of an infant. This, however, will be mentioned in treating of the crime of rape. In some states the age of incapacity has been changed by statute.[11]

[6] Irby v. State, 32 Ga. 496; Law v. Com., 75 Va. 885, 40 Am. Rep. 750. His own testimony that he did not know the act was wrong is not enough. State v. Kluseman, 53 Minn. 541, 55 N. W. 741.

[7] York's Case, Fost. 70.

[8] Emlyn on 1 Hale, P. C. 25.

[9] State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404. And see State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; Martin v. State, 90 Ala. 602, 8 South. 858, 24 Am. St. Rep. 844.

[10] 4 Bl. Comm. 22. Minor not emancipated or possessed of property cannot be held criminally liable for failure to support his wife. People v. Todd, 61 Mich. 234, 28 N. W. 79. Nor can a minor be convicted of selling mortgaged goods, as he has a right to disaffirm the mortgage, and in effect does so by the sale. Jones v. State, 31 Tex. Cr. R. 252, 20 S. W. 578. But he may be held liable in bastardy proceedings. Chandler v. Com., 4 Metc. (Ky.) 66.

[11] In Minnesota the presumption of incapacity which may be rebutted ceases at the age of 12. Pen. Code, § 16.

INSANITY.

23. Insanity, in its legal sense, is any defect or disease of the mind which renders a person incapable of entertaining a criminal intent. Since a criminal intent is an essential element of every crime, no person who is so insane that he cannot entertain it is criminally responsible for his acts.

24. Defect of the mind, as in case of idiocy, or disease of the mind, as in case of lunacy, may have the following effects:

(a) It may render a person incapable of determining between right and wrong, and in such case no criminal responsibility attaches.

(b) It may render a person partially insane, or subject to insane delusions as to existing facts, but not in other respects insane, in which case he will be in the same situation as to responsibility as if the facts in respect to which the insane delusion exists were real.

(c) It may deprive him of freedom of will, as in case of irresistible impulses, in which case some courts hold that he is not responsible, while other courts hold the contrary.

25. Moral and emotional insanity, as distinguished from mental, does not exempt one from responsibility.

26. A person cannot be tried, if he is insane, though he was sane when he committed the act, as he is deemed incapable of conducting his defense; nor can an insane person be sentenced and punished, even after conviction.[1]

Inability to Distinguish Between Right and Wrong.

If a person is incapable, because of idiocy or lunacy, from distinguishing between right and wrong as to a particular act at the time he does it, he is not criminally responsible. It is not necessary that this defect of reason be general, nor

§§ 23–26. [1] 4 Bl. Comm. 24; State v. Peacock, 50 N. J. Law, 34, 11 Atl. 270; State v. Pritchett, 106 N. C. 667, 11 S. E. 357. See Clark, Cr. Proc. 427.

that it be permanent. If a person at the time of committing an act is incapable of understanding whether it is right or wrong, he is not responsible, though he may have had his reason before the act, and may have recovered afterwards, and though, at the time of the act, he may have been able to distinguish between right and wrong as to other acts. By wrong, as used here, is meant moral wrong, as distinguished from legal wrong. The fact that one cannot distinguish between the legality or illegality of an act does not exempt him from responsibility if he is of sufficient intelligence to know that it is morally wrong. The question is whether or not he knows it is an act he ought not to do. The incapacity must be caused by defect or disease of the mind. The leading case on the subject of insanity is that of McNaghten, decided in England in 1843.[2] After the defendant in that case had been acquitted, on the ground of insanity, the question came up on debate in the house of lords, and the opinion of the judges was asked. The judges answered, among other things, that jurors should be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time the act was committed, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The test of responsibility as here laid down has been generally applied, both in England and in this country.[3] "He must have sufficient power of

[2] McNaghten's Case, 10 Clark & F. 200.

[3] Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Dunn v. People, 109 Ill. 635; Hornish v. People, 142 Ill. 620, 32 N. E. 677, 18 L. R. A.

memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty." [4] But, as we shall presently see, the courts of some of the states, and even in England, have gone further and exempted a person laboring under an insane irresistible impulse, where he knew that his act was wrong.

Partial Insanity—Insane Delusions.

Another answer of the judges to the house of lords, after the McNaghten Case, was in reply to the question whether a person would be excused if he should commit an offense under and in consequence of an insane delusion as to existing facts. The answer was, in substance, that if a person is laboring under a partial delusion, not being in other respects insane, he must be considered in the same situation as to responsibility as if the facts in respect to which the delusion exists were real; that if, for example, a person, under the influence of his delusion, supposes another man to be in the act of attempting to take his life, and he kills that man, as he supposes, in self-defense, he would be exempt from

237; Blackburn v. State, 23 Ohio St. 146; Brown v. Com., 78 Pa. 122; Spann v. State, 47 Ga. 553; U. S. v. McGlue, 1 Curt. 8, Fed. Cas. No. 15,679; U. S. v. Faulkner (D. C.) 35 Fed. 730; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; State v. Gut, 13 Minn. 341 (Gil. 315). Idiocy: Com. v. Heath, 11 Gray (Mass.) 303; Ortwein v. Com., 76 Pa. 414, 18 Am. Rep. 420. Imbecility or dementia, not amounting to idiocy or lunacy, may exempt where the intellect was weaker than that of a child. State v. Richards, 39 Conn. 591. But see Wartena v. State, 105 Ind. 445, 5 N. E. 20. Ability to "carefully weigh reasons" not necessary to render one liable. State v. Swift, 57 Conn. 496, 18 Atl. 664. And see cases in other states, cited in subsequent notes.

[4] Per Shaw, C. J., in Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458.

punishment, but if his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment. This is now recognized as the law both in England and in this country.[5] It is obvious that the rule as to insane delusions or partial insanity is but an application of the so-called "right and wrong test." It is necessary, however, to understand what the law means by an insane delusion. The delusion must be mental, and not moral; that is, it must not arise from moral degradation or passion, as this is mere moral insanity. There must be an actual delusion, and it is also necessary that the act shall be immediately connected with the delusion. If a person knows all the facts as to which he acts, he is not exempt, and it is immaterial that he has an insane delusion as to other facts.[6] Another essential is that the delusion must not be the result of negligence. If a person has the opportunity, and has sufficient reason, to correct a delusion, and, instead of doing so, continues to nourish it, he is responsible. Mere false judg-

[5] Reg. v. Burton, 3 Fost. & F. 772; Hadfield's Case, 27 How. St. Tr. 1282; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; People v. Pine, 2 Barb. (N. Y.) 571; Lynch v. Com., 77 Pa. 205; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; People v. Slack, 90 Mich. 448, 51 N. W. 533; State v. Lewis, 20 Nev. 333, 22 Pac. 241; Thurman v. State, 32 Neb. 224, 49 N. W. 338. Homicide, delusion that deceased was trying to marry defendant's mother no excuse. Bolling v. State, 54 Ark. 588, 16 S. W. 658. Killing fellow convict, delusion that deceased had divulged plan of escape no excuse. People v. Taylor, 138 N. Y. 398, 34 N. E. 275.

[6] Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; State v. Gut, 13 Minn. 341 (Gil. 315); State v. Huting, 21 Mo. 464; State v. Windsor, 5 Har. (Del.) 512; U. S. v. Ridgeway (C. C.) 31 Fed. 144; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Maier, 36 W. Va. 757, 15 S. E. 991.

ment does not amount to an insane delusion, nor do erroneous opinions on questions of religion or politics.[7]

Irresistible Impulse.[8]

A person acts under an insane irresistible impulse when, from disease of the mind, he is incapable of restraining himself, though he may know that he is doing wrong. In other words, a person may know that he is doing wrong when he does an act, but, by reason of the duress of a mental disease, he may have lost the power to choose between the right and wrong, and to avoid doing the act, his free agency being at the time destroyed.[9] In some states, and in England, the courts have refused to recognize this as a ground of exemption from responsibility, and limit the test to the ability to distinguish between right and wrong,[10] but in other states it is recognized.[11]

[7] Guiteau's Case (D. C.) 10 Fed. 171.

[8] There is great danger of being misled by the cases on moral insanity and irresistible impulse from disease of the mind, as the judges sometimes use the former term when they mean the latter. The student, therefore, and the lawyer as well, must examine the cases, and see whether the irresistible impulse spoken of arose from mental disease, or from mere moral depravity.

[9] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193 (explaining irresistible impulse).

[10] Reg. v. Stokes, 3 Car. & K. 185; Reg. v. Haynes, 1 Fost. & F. 666; State v. Lawrence, 57 Me. 574; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731 (but contra in case of epilepsy, People v. Barber, 115 N. Y. 475, 22 N. E. 182; and for kleptomania case, see People v. Sprague, 2 Parker, Cr. R. [N. Y.] 43); Brinkley v. State, 58 Ga. 296; Fogarty v. State, 80 Ga. 450, 5 S. E. 782; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; State v. Pagels, 92 Mo. 300, 4 S. W. 931; State v. Miller, 111 Mo. 542, 20 S. W. 243; State v. Mowry, 37 Kan. 369, 15 Pac. 282; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am.

[11] See note 11 on following page.

The argument against recognizing irresistible impulse as a ground of exemption is practical, rather than logical. "If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence, —the restraint of religion, the restraint of conscience, and the restraint of law. But, if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint,—the forbidding and punishing its perpetration." [12] The fallacy of the argument

St. Rep. 879; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312. In some states the defense of irresistible impulse is excluded by statute. People v. Taylor, 138 N. Y. 398, 34 N. E. 275; State v. Scott, 41 Minn. 365, 43 N. W. 62.

[11] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193 (the best illustrative case); Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; People v. Finley, 38 Mich. 482; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; State v. Felter, 25 Iowa, 67; State v. Mewherter, 46 Iowa, 88; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Dacey v. People, 116 Ill. 555, 6 N. E. 165; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Bradley v. State, 31 Ind. 492, at page 509; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Com. v. Mosler, 4 Pa. 266; Ortwein v. Com., 76 Pa. 414, 18 Am. Rep. 420; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Smith v. Com., 1 Duv. (Ky.) 224; State v. Windsor, 5 Har. (Del.) 512; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; State v. Johnson, 40 Conn. 136; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638. Kleptomania cases: Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646; People v. Sprague, 2 Parker, Cr. R. (N. Y.) 43. And see Com. v. Fritch, 9 Pa. Co. Ct. R. 164.

[12] Per Bramwell, B., in Reg. v. Haynes, 1 Fost. & F. 666.

is the assumption that it is possible by law to restrain an irresistible impulse. The works on medical jurisprudence agree that such insanity exists, and, if it does, then a person so affected has control over his will no more than if a stronger man seized his hand, and made him commit a wrong. In the latter case, as well as in the former, he knows that the act is wrong. We have already seen that the law does not punish involuntary acts. The difficulty is in proving an insane irresistible impulse, and distinguishing it from moral insanity, which is defined in the following paragraph. Some of the courts which refuse to recognize irresistible impulse from disease of the mind say that there is no such thing, and that it is nothing but moral depravity. If, however, as men of science declare, there is such a disease, it would seem that its existence should be a question of fact for the jury, and not for the judge. In any event, where the defense is recognized, the impulse must be irresistible, and must be caused by disease of the mind. Mere passion in a sane person does not exempt, as it is nothing more than moral insanity. It also seems that the act must be so connected with the mental disease, in the relation of cause and effect, as to be the product of it solely.[13]

Moral and Emotional Insanity.

"Moral insanity" is a term applied to a perverted condition of the moral nature, which impels a man naturally towards crime. Thus, from low associations and surroundings, and from constant and unrestrained indulgence in vice, a man's disposition or character may become so morbid and diseased that his conscience will not restrain him. Although his mind may be sound, and he may know right from wrong, his passions may have become so strong that he has virtually lost control of them. This condition is distinguished from

[13] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193.

the irresistible impulse, already explained, by the fact that the mind is not diseased, as in the latter case. Moral insanity does not exempt a person from criminal responsibility,[14] though it seems that in one state, at least, it has been recognized as a defense.[15] Mere emotional insanity or temporary frenzy or passion arising from excitement or anger, and not from any mental disease, is never an excuse.[16]

Presumption and Burden of Proof.

The rules of evidence in criminal cases give the state the burden of proof, and require that the jury shall be satisfied of defendant's guilt beyond a reasonable doubt. All persons are presumed to be innocent until the contrary is clearly proven, and if, on all the evidence, there is a reasonable doubt, the jury are bound to acquit. In view of this rule, it would seem that where a defendant sets up the plea of insanity, and the jury have a reasonable doubt on the question, they should acquit him; but the courts are not agreed on this point. They are agreed, however, to this extent, namely, that all men are presumed to be sane until the contrary appears, and that a defendant who sets up the plea of

[14] Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; U. S. v. Holmes, 1 Cliff. 98, Fed. Cas. No. 15,382; State v. Lawrence, 57 Me. 574; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; State v. Potts, 100 N. C. 457, 6 S. E. 657; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; People v. Finley, 38 Mich. 482; People v. Durfee, 62 Mich. 487, 29 N. W. 109.

[15] Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461.

[16] People v. Mortimer, 48 Mich. 37, 11 N. W. 776; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; People v. Foy, 138 N. Y. 664, 34 N. E. 396; People v. McDonell, 47 Cal. 134; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; State v. Johnson, 40 Conn. 136; State v. Sorenson, 32 Minn. 118, 19 N. W. 738; State v. Murray, 11 Or. 413, 5 Pac. 55; State v. Stickley, 41 Iowa, 232; Williams v. State, 50 Ark. 511, 9 S. W. 5; Smith v. State, 55 Ark. 259, 18 S. W. 237.

insanity must introduce some evidence to rebut the presumption. When we get to this point, the courts begin to differ. It has been said by some courts that the burden is on the defendant to establish his insanity beyond a reasonable doubt,—that is to say, if the jury have any doubt, they must convict;[17] but this is probably not the law now in any of the states. Other courts hold that the burden is on defendant to prove insanity by a preponderance of the evidence, and that it is not sufficient for him to raise a reasonable doubt.[18] Many other courts, on the contrary, hold that, though the burden is on the defendant to introduce some evidence to rebut the presumption of sanity, yet, if the evidence raises a reasonable doubt as to whether he was sane,

[17] Reg. v. Stokes, 3 Car. & K. 188; State v. Brinyea, 5 Ala. 244; State v. Huting, 21 Mo. 476; People v. Myers, 20 Cal. 518; State v. Spencer, 21 N. J. Law, 202.

[18] Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; (but see Com. v. Harrison, 11 Gray [Mass.] 308); Loeffner v. State, 10 Ohio St. 598; Fisher v. People, 23 Ill. 283 (but see, contra, Langdon v. People, 133 Ill. 382, 24 N. E. 874); State v. Lawrence, 57 Me. 574; State v. Starling, 51 N. C. 366; State v. Davis, 109 N. C. 780, 14 S. E. 55; State v. McCoy, 34 Mo. 531, 86 Am. Dec. 121; State v. Schaefer, 116 Mo. 96, 22 S. W. 447; Bonfanti v. State, 2 Minn. 123 (Gil. 99); State v. Grear, 29 Minn. 221, 13 N. W. 140; State v. Trout, 74 Iowa, 545, 38 N. W. 405, 7 Am. St. Rep. 499; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Rather v. State, 25 Tex. App. 623, 9 S. W. 69; Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193; Gunter v. State, 83 Ala. 96, 3 South. 600; Maxwell v. State, 89 Ala. 150, 7 South. 824; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Bawden, 90 Cal. 195, 27 Pac. 204; Fogarty v. State, 80 Ga. 450, 5 S. E. 782; Coates v. State, 50 Ark. 330, 7 S. W. 304; Bolling v. State, 54 Ark. 588, 16 S. W. 658; Moore v. Com., 92 Ky. 630, 18 S. W. 833; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Lewis, 20 Nev. 333, 22 Pac. 241; People v. Dillon, 8 Utah, 92, 30 Pac. 150.

he is entitled to an acquittal.[19] The cases cited will show how the courts of the different states stand on this question.

DRUNKENNESS.

27. Voluntary drunkenness furnishes no ground of exemption from criminal responsibility, except—

EXCEPTIONS—(a) Where the act is committed while laboring under settled insanity, or delirium tremens, resulting from intoxication.

(b) Where a specific intent is essential to constitute the crime, the fact of intoxication may negative its existence.

(c) In prosecutions for murder, the fact of intoxication may be material on the question of provocation, reducing the crime to manslaughter.

28. Drunkenness does not aggravate an offense.

29. No criminal responsibility attaches for acts committed while in a state of involuntary drunkenness, destroying the reason and will.

When a person voluntarily drinks, and becomes intoxicated, and, while in such a condition, commits an act which would be a crime if he were sober, he is nevertheless respon-

[19] Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; U. S. v. Faulkner (D. C.) 35 Fed. 730; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; Brotherton v. People, 75 N. Y. 159; Walker v. People, 88 N. Y. 81; State v. Nixon, 32 Kan. 205, 4 Pac. 159; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Grubb v. State, 117 Ind. 217, 20 N. E. 257, 725; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Revoir v. State, 82 Wis. 295, 52 N. W. 84; Com. v. Gerade, 145 Pa. 289, 22 Atl. 464, 27 Am. St. Rep. 689; King v. State, 91 Tenn. 617, 20 S. W. 169; Hodge v. State, 26 Fla. 11, 7 South. 593; Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905. In the absence of any evidence to raise a reasonable doubt, the prosecution is not obliged to prove sanity. Montag v. People, 141 Ill. 75, 30 N. E. 337; Armstrong v. State, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484.

sible, the settled rule being that voluntary drunkenness is no excuse.[1] A person may be so drunk when he commits an act that he is incapable, at the time, of knowing what he is doing; but in case of voluntary intoxication a man is not the less responsible for the reasonable exercise of his understanding, memory, and will. A drunken man, equally with a sober man, is presumed to intend his acts, and the natural and ordinary consequences. It seems that it is immaterial that the intoxication of a person at the time he commits an act is the result of dipsomania, or an uncontrollable desire for drink, caused by long indulgence of the appetite.[2] Where, however, settled insanity or delirium tremens results from voluntary drunkenness, the insanity is regarded as the remote, and not the proximate, cause of the voluntary drinking, and furnishes the same exemption from responsibility as insanity from any other cause.[3] It seems,

§§ 27–29. [1] Pearson's Case, 2 Lewin, Cr. Cas. 144; U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993; Com. v. Hawkins, 3 Gray (Mass.) 463; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People v. Walker, 38 Mich. 156; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; State v. John, 30 N. C. 330, 49 Am. Dec. 396; Pirtle v. State, 9 Humph. (Tenn.) 663; McIntyre v. People, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; Upstone v. People, 109 Ill. 169; People v. Lewis, 36 Cal. 531; People v. Travers, 88 Cal. 233, 26 Pac. 88; Willis v. Com., 32 Grat. (Va.) 929; Fonville v. State, 91 Ala. 39, 8 South. 688; Engelhardt v. State, 88 Ala. 100, 7 South. 154; Beck v. State, 76 Ga. 452; State v. Lowe, 93 Mo. 547, 5 S. W. 889; State v. Mowry, 37 Kan. 369, 15 Pac. 282. No defense on voting twice at election. State v. Welch, 21 Minn. 22. Contra, People v. Harris, 29 Cal. 679. The fact that liquor was furnished by person killed no defense. State v. Sopher, 70 Iowa, 494, 30 N. W. 917.

[2] Choice v. State, 31 Ga. 424; State v. Potts, 100 N. C. 457, 6 S. E. 657; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052. But see, contra, State v. Pike, 49 N. H. 399, 6 Am. Rep. 533.

[3] Regina v. Davis, 14 Cox Cr. Cas. 563; U. S. v. Drew, 5 Mason,

also, that if a person, through a susceptibility to stimulants, resulting from some cause of which he is not aware, is made drunk by a small quantity of liquor, which he has been accustomed to drink without such effect, he will not be held liable as in case of voluntary drunkenness. His intoxication, in such case, is more properly regarded as involuntary.[4]

Same— Where Specific Intent Required.

An important exception to the rule that voluntary drunkenness furnishes no exemption from criminal responsibility is in cases where the law requires a specific intent to render an act a particular crime or degree of crime. The mere intent to become intoxicated, actual, or implied from the fact of drinking, can only supply a general wrongful intent. Where a person is too drunk when he commits an act to entertain a specific intent, essential in order that the act may constitute a particular crime, and did not first form such intent, and then become intoxicated, he is not responsible for that particular crime. If, however, one makes up his mind to do an act, entertaining the necessary specific intent, and then becomes intoxicated, and commits it, he is responsible. At common law one may commit murder although the homicide is not premeditated, and even without actual intention to kill; and upon an indictment for murder voluntary drunkenness is no excuse. But where, by statute, murder is di-

28, Fed. Cas. No. 14,993; U. S. v. McGlue, 1 Curt. 1, 13, Fed. Cas. No. 15,679; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Macconnehey v. State, 5 Ohio St. 77; State v. Potts, 100 N. C. 457, 6 S. E. 657; Fisher v. State, 64 Ind. 435; Wagner v. State, 116 Ind. 181, 18 N. E. 833; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Kelley v. State, 31 Tex. Cr. R. 216, 20 S. W. 357; Terrill v. State, 74 Wis. 278, 42 N. W. 248; French v. State, 93 Wis. 325, 67 N. W. 706.

[4] 1 Whart. Cr. Law, § 55. And see Roberts v. People, 19 Mich. 401.

vided into two degrees, and, to constitute murder in the first degree, a premeditated design or deliberate premeditation to kill is required, a person who, when he kills another, is too drunk to be capable of such design or premeditation, and who had not such design when he drank, cannot be held responsible for murder in the first degree.[5] But if one makes up his mind to kill another, and then becomes drunk, and kills him, he is guilty of that degree of murder.[6] This is so also in case of larceny or robbery, in which the specific intent to steal the goods taken is necessary;[7] and in many

[5] Tucker v. U. S., 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112; Hopt v. People, 104 U. S. 631, 26 L. Ed. 873; State v. Johnson, 40 Conn. 136, 41 Conn. 584; Keenan v. Com., 44 Pa. 55, 84 Am. Dec. 414; Jones v. Com., 75 Pa. 403; Willis v. Com., 32 Grat. (Va.) 929; Haile v. State, 11 Humph. (Tenn.) 154; Pirtle v. State, 9 Humph. (Tenn.) 663; Reagan v. State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Bernhardt v. State, 82 Wis. 23, 51 N. W. 1009; King v. State, 90 Ala. 612, 8 South. 856; People v. Belencia, 21 Cal. 544; People v. Vincent, 95 Cal. 425, 30 Pac. 581; People v. Leonardi, 143 N. Y. 360, 38 N. E. 372; Same v. Corey, 148 N. Y. 476, 42 N. E. 1066; Hill v. State, 42 Neb. 503, 60 N. W. 916.

[6] State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799. And see State v. Gut, 13 Minn. 341 (Gil. 315); State v. Douglass (Kan.) 24 Pac. 1118; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85.

[7] Loza v. State, 1 Tex. App. 488, 28 Am. Rep. 416; People v. Cummins, 47 Mich. 334, 11 N. W. 184, 186; People v. Walker, 38 Mich. 156; Wood v. State, 34 Ark. 341, 36 Am. Rep. 13; State v. Schingen, 20 Wis. 74; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Keeton v. Com., 92 Ky. 522, 18 S. W. 359; Bailey v. State, 26 Ind. 422; Rogers v. State, 33 Ind. 543. But see, contra, Dawson v. State, 16 Ind. 428, 79 Am. Dec. 439. See dictum in Bartholomew v. People, 104 Ill. 605, 44 Am. Rep. 97. Taking property for fun while intoxicated, People v. Wilson, 55 Mich. 507, 21 N. W. 905. Voting twice at election, People v. Harris, 29 Cal. 679. Contra, State v.

other crimes, such as perjury,[8] assaults with intent to murder or to do great bodily harm,[9] or to rape,[10] or breaking into a house with intent to steal or commit some other felony therein, as in case of burglary,[11] or passing a forged check or counterfeit money.[12] In some states the statutes do not allow drunkenness to be shown to negative intent.[13]

Murder and Manslaughter.

When we come to treat of homicide, we shall see that murder, at common law, is the killing of a person with malice aforethought. We shall also see that, if the killing is done under what the law recognizes as sufficient provocation to exclude malice, the homicide is manslaughter only. To constitute the malice essential to murder at common law (or murder in the second degree under the statutes), no specific intent to kill is necessary, but general malice will suffice. Now, we have seen that in case of voluntary drinking a drunken man, equally with a sober man, is presumed to intend his acts and their natural results, and that it is no excuse for him to say that he was drunk. Drunkenness,

Welch, 21 Minn. 22. Intent to do bodily harm, State v. Garvey, 11 Minn. 154 (Gil. 95).

[8] Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 903.

[9] Lancaster v. State, 2 Lea (Tenn.) 575; Roberts v. People, 19 Mich. 401; Chrisman v. State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44; State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296. And see State v. Garvey, 11 Minn. 154 (Gil. 95). So of attempt to commit suicide. Reg. v. Doody, 6 Cox, Cr. Cas. 463.

[10] State v. Donovan, 61 Iowa, 369, 16 N. W. 206; Head v. State, 43 Neb. 30, 61 N. W. 494.

[11] State v. Bell, 29 Iowa, 316; People v. Phelan, 93 Cal. 111, 28 Pac. 855.

[12] O'Grady v. State, 36 Neb. 320, 54 N. W. 556; Pigman v. State, 14 Ohio, 555, 45 Am. Dec. 558.

[13] Bartholomew v. People, 104 Ill. 605, 44 Am. Rep. 97. And see State v. Cross, 27 Mo. 332; State v. Tatro, 50 Vt. 483.

therefore, is no defense on a prosecution for murder. Some courts, however, allow the fact of drunkenness to be shown on an indictment for murder, where there is evidence of adequate provocation, not to negative the intent, which the law presumes from the killing, but to show that the act was committed under the influence of sudden passion, caused by the provocation; passion being more easily excited in a man when he is drunk than when he is sober, and thus to reduce the crime to manslaughter.[14]

Drunkenness as Aggravating Offense.

According to the old law, voluntary drunkenness was regarded as an aggravation of the offense,[15] but this is no longer the law. Drunkenness may be punishable as a substantive crime, even at common law, if it is so open and notorious as to offend the sense of public decency and constitute a public nuisance; but a specific crime is never aggravated by the fact that the accused was drunk when he committed it.[16]

Involuntary Intoxication.

If a person involuntarily, through the stratagem or fraud of another, or the negligence of his physician, becomes so drunk that he does not know what he is doing, he is not

[14] Rex v. Thomas, 7 Car. & P. 817; In re Pearson, 2 Lewin, Cr. Cas. 144; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Buckhannon v. Com., 86 Ky. 110, 5 S. W. 358; Jones v. Com., 75 Pa. 403; Jones v. State, 29 Ga. 594; Malone v. State, 49 Ga. 210; Cluck v. State, 40 Ind. 263; Haile v. State, 11 Humph. (Tenn.) 154; McIntyre v. People, 38 Ill. 514; Ferrell v. State, 43 Tex. 503; Wenz v. State, 1 Tex. App. 36; People v. Williams, 43 Cal. 344; Williams v. State, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133. Contra, Com. v. Hawkins, 3 Gray (Mass.) 463.

[15] 4 Bl. Comm. 25, 26; 1 Inst. 247.

[16] McIntyre v. People, 38 Ill. 514.

criminally responsible for his acts.[17] The drinking itself must be involuntary, for one cannot drink intoxicating liquors to excess, or voluntarily take liquor in a social way, and, after committing a crime, say he did not intend to become drunk.[18] As was said in the preceding paragraph, a person may not be regarded as having become voluntarily intoxicated if he drinks moderately, and becomes intoxicated only because of an unknown susceptibility.

CORPORATIONS.

30. A corporation may be criminally liable for omission to perform a duty imposed upon it by law.

31. A corporation may be criminally liable for certain acts of misfeasance, such as maintaining a nuisance. It cannot be guilty of felony or perjury, or (it seems) of offenses against the person, or of those involving malice or evil intention.

32. A corporation may be punished for contempt of court.

Nonfeasance.

Although it was once said that "a corporation is not indictable, but the particular members of it are," [1] it is now well settled that a corporation may be indicted for omission to perform a public duty imposed upon it by law.[2] While it cannot be imprisoned, it may, if such punishment is provided for, be fined, and deprived of its charter and franchises. Thus a railway company may be indicted for neglect to keep

[17] 1 Hale, P. C. 32; In re Pearson, 2 Lewin, Cr. Cas. 144.

[18] McCook v. State, 91 Ga. 740, 17 S. E. 1019.

§§ 30–32. [1] Anon., 12 Mod. 559.

[2] Reg. v. Birmingham & G. Ry. Co., 3 Q. B. 223; New York & G. L. R. Co. v. State, 50 N. J. Law, 303, 13 Atl. 1, affirmed in 53 N. J. Law, 244, 23 Atl. 168. Contra in New York, People v. Gaslight Co. (Gen. Sess.) 5 N. Y. Supp. 19.

in repair a bridge across a cut made by it, when its road crosses a public highway, so that travel is obstructed.[3]

Misfeasance.

Some cases have held that a corporation cannot be indicted for misfeasance; that it cannot commit a crime by positive or affirmative act,—as by maintaining a nuisance by obstructing a navigable river.[4] This view, however, has not prevailed, and it is well settled to-day that an indictment will lie against a corporation for many acts of misfeasance. Thus an indictment lies for maintaining a nuisance by obstructing a navigable river or a public highway.[5] And corporations have been held criminally liable for the unlawful sale of intoxicating liq-

[3] New York & G. L. R. Co. v. State, supra.

[4] State v. Manufacturing Co., 20 Me. 41, 37 Am. Dec. 38 (overruled by State v. City of Portland, 74 Me. 268, 43 Am. Dec. 586); Com. v. Turnpike Co., 2 Va. Cas. 362. And see State v. Railroad Co., 23 Ind. 362. Corporations are now liable by statute in Indiana, State v. Railroad Co., 120 Ind. 298, 22 N. E. 307.

[5] Reg. v. Great North of England Ry. Co., 2 Cox, Cr. Cas. 70; Com. v. Proprietors, 2 Gray (Mass.) 339; Louisville & N. R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State v. Railroad Co., 91 Tenn. 445, 19 S. W. 229; St. Louis, A. & T. Ry. Co. v. State, 52 Ark. 51, 11 S. W. 1035; Donaldson v. Railroad Co., 18 Iowa, 280, 87 Am. Dec. 391; State v. Railway Co., 77 Iowa, 442, 42 N. W. 365, 4 L. R. A. 298; State v. Lumber Co., 109 N. C. 860, 13 S. E. 719; State v. Corporation, 111 N. C. 661, 16 S. E. 331; State v. Railroad Co., 91 Tenn. 445, 19 S. W. 229; State v. Railroad Co., 37 W. Va. 108, 16 S. E. 519; Chicago & E. I. R. Co. v. People, 44 Ill. App. 632; State v. Railroad Co., 88 Iowa, 508, 55 N. W. 727; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570. And see Northern Cent. Ry. Co. v. Com., 90 Pa. 305; Pittsburgh & A. Bridge Co. v. Com. (Pa.) 8 Atl. 217; Palatka & I. R. R. Co. v. State, 23 Fla. 546, 3 South. 158, 11 Am. St. Rep. 395; Savannah, F. & W. Ry. Co. v. State, 23 Fla. 579, 3 South. 204; State v. Railroad Co., 29 N. J. Law, 353; State v. Railroad Co., 32 N. J. Law, 220.

A municipal corporation may be indicted for maintaining a nui-

uor,[6] for violating the Sunday laws,[7] and for libel.[8] On prosecution of a corporation for a nuisance by obstructing a navigable stream, the corporation contended that, while it might be held liable for nonfeasance or omission to perform a legal duty or obligation, it could not be held criminally liable for misfeasance. The indictment, however, was sustained. "Corporations," said the court, "cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, or of perjury or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them." [9] So it has been held that a corporation may be indicted under a statute making it an offense for any person to permit gaming on his premises. "It is true," said the court, "there are crimes of which from their very nature —as perjury, for example—they [corporations] cannot be guilty. There are crimes to the punishment of which, for a like reason, they cannot be subjected,—as in the case of a felony. But whenever the crime consists in either a misfeasance or a nonfeasance of duty to the public, and the corporation can be reached for punishment, as by a fine and the seizure of its property, precedent authorizes, and public

sance, or neglecting to remove a nuisance which it has the power to remove. People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; State v. City of Portland, 74 Me. 268, 43 Am. Dec. 586.

[6] Stewart v. Waterloo Turn Verein, 71 Iowa, 226, 32 N. W. 275. 60 Am. Rep. 786 (action for penalty).

[7] State v. Railroad Co., 15 W. Va. 362, 36 Am. Rep. 803.

[8] State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

[9] Com. v. Proprietors, 2 Gray (Mass.) 339.

policy requires, that it should be liable to indictment. * * * If the penalty prescribed for the act be both fine and imprisonment, then, so far as the punishment cannot, from the nature of the offender, be carried out, the statute is, of course, inoperative." [10]

Crimes Involving Particular Intent or Personal Violence.

A corporation may be held liable in tort for malicious wrongs, such as libel or malicious prosecution, and for fraud, the malice or evil intent of the agent being imputed to it; and it may be held liable civilly for assault and battery; and exemplary or punitive damages may be recovered in proper cases.[11] There appears to be no sufficient reason why this doctrine should not be extended so as to render corporations criminally liable in such cases, so far as the nature of the punishment provided for by statute permits this to be done.[12] In a case where it was held that a corporation was indictable for keeping a disorderly house, the New Jersey court, after adverting to the civil liability of corporations in such cases, said: "It is difficult, therefore, to see how a corporation may be amenable to a civil suit for libel and malicious prosecution and private nuisance, and be mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public. * * * The question whether a criminal intent may be imputed to a corporation is not necessarily involved in the discussion of the case before us. The habitual indulgence in the vicious practices on the premises of the defendant corporation stamps it as a disorderly house, without regard to the intent which prompted the disorder." [13]

[10] Com. v. Association, 92 Ky. 197, 17 S. W. 442.
[11] Clark, Corp. 193, 199.
[12] 1 Whart. Cr. Law, § 87.
[13] State v. Society, 54 N. J. Law, 260, 23 Atl. 680.

The rule is generally declared, however, that a corporation is not criminally liable for malicious wrongs, or for wrongs involving evil intention or personal violence.[14]

Contempt of Court.

A corporation may be guilty of a contempt of court by reason of acts or omissions of its officers,—as for violation of an injunction. In such cases the court has the same power to punish by fine as in the case of a natural person.[15]

IGNORANCE OR MISTAKE OF LAW.

33. Ignorance on the part of the wrongdoer of the law which makes an act criminal is no excuse.

34. If a specific intent is essential to a crime, and ignorance of the law negatives such intent, such ignorance prevents the crime from being consummated.

Ignorance or mistake, as affecting the mental element essential to crime, may have an important bearing upon the criminal liability of the accused. The subject divides itself into ignorance and mistake of (1) law and (2) fact.

It is the settled rule that every one is presumed to know the law, and that ignorance thereof furnishes no exemption from criminal responsibility.[1] This rule was even ap-

[14] See Orr v. Bank, 1 Ohio, 36, 13 Am. Dec. 588; Com. v. Proprietors, supra. But see State v. Atchison, supra.

[15] Clark, Corp. 220, citing People v. Railroad Co., 12 Abb. Prac. (N. Y.) 171; Golden Gate Consol. Hydraulic Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Mayor, etc., of New York v. Ferry Co., 64 N. Y. 624; U. S. v. Railroad Co. (C. C.) 6 Fed. 237.

§§ 33–34. [1] 4 Bl. Comm. 27; Whitton v. State, 37 Miss. 379; Jellico Coal Min. Co. v. Com., 96 Ky. 373, 29 S. W. 26. Belief of convict in right to vote, Hamilton v. People, 57 Barb. (N. Y.) 625. But see Com. v. Bradford, 9 Metc. (Mass.) 268. Mistake of law as to one's right to take life no excuse for homicide, People v. Cook, 39 Mich. 236, 33 Am. Rep. 380. Contra, on prosecution for taking illegal fees, State v. Cutter, 36 N. J. Law, 125.

plied in the extreme case of violation of a statute by a person who was at sea when it was enacted, and when he violated it, and who could not have learned of it.[2] Even foreigners coming into a country, and ignorantly violating its laws, are liable, though the act may not be a crime in their own country.[3] Nor is positive belief that an act is lawful an excuse. It is no defense that one who has violated a law believed in good faith that it was unconstitutional, and was so advised by learned counsel. It was so held in a prosecution in New York of Susan B. Anthony for illegally voting for members of congress, in which she set up the defense that she believed, and had been advised by counsel, that she was entitled to vote.[4] An erroneous belief in the right to marry, and advice of a justice that such right exists, is no excuse on prosecution for bigamy or adultery.[5] So, if a Mormon marries more than one woman, he cannot escape liability for bigamy on the ground that he thought the law prohibiting a man from having a plurality of wives did not apply to a marriage by him in accordance with his religion, or that it was an invalid law.[6]

Specific Intent.

On the other hand, if a specific intent is essential to a crime, and ignorance of law negatives the existence of such intent, the ignorance necessarily furnishes an exemption.

[2] Rex v. Bailey, Russ. & R. 1.

[3] Rex v. Esop, 7 Car. & P. 456; Barronet's Case, 1 El. & Bl. 1 (a case of dueling by a Frenchman in England).

[4] U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459.

[5] State v. Goodenow, 65 Me. 30; Medrano v. State, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

[6] Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244; Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481. See, also, as to effect of religious belief, Reg. v. Downes, 13 Cox, Cr. Cas. 111. Ante, p. 49, and cases cited. Post, p. 356.

An example is in the case of larceny. Here it is essential that the property shall be taken with a specific fraudulent intent, and one who takes property which, because of his ignorance of the law, he in good faith believes to be his own, does not commit the crime of larceny.[7] So, where a woman was indicted for setting fire to furze growing on a common, under a statute making it a felony "unlawfully and maliciously" to set fire to furze, it was held that, if she set the fire thinking she had a right to do so, it would not be a criminal offense.[8]

IGNORANCE OR MISTAKE OF FACT—COMMON-LAW OFFENSES.

35. At common law, ignorance or mistake of fact, as a rule, exempts a person from criminal liability, if the act done would be lawful were the facts as the actor believes, provided that the ignorance or mistake is not voluntary, or due to negligence.

SAME—STATUTORY OFFENSES.

36. Where an offense is defined by statute, whether or not ignorance or mistake of fact exempts a person doing a prohibited act from criminal liability, as at common law, depends upon the language and construction of the statute. Unless the intention is clearly expressed, it must be determined by a construction of the statute, in view of the nature of the offense and the evils to be remedied, and of other matters making the one construction or the other reasonable, whether it was the intention to make knowledge of the facts an essential element of the offense.

[7] Rex v. Hall, 3 Car. & P. 409; Reg. v. Reed, Car. & M. 306; Com. v. Stebbins, 8 Gray (Mass.) 492; People v. Husband, 36 Mich. 306. Mere custom to take another's property, such as fruit, and belief that there is no harm, are no excuse. Com. v. Doane, 1 Cush. (Mass.) 5.

[8] Reg. v. Twose, 14 Cox, Cr. Cas. 327.

Common-Law Offenses.

The ground on which ignorance or mistake as to facts is an excuse for doing an act which but for such mistake would be a crime is because of the absence of criminal intent. The law looks at the circumstances from the standpoint of the accused, and does not punish him, if, assuming the facts to be as they seemed to him, he committed no wrong. Thus, if one shoots another in his house, supposing, on reasonable grounds, that he is a burglar, he is in the same position as if he had shot a burglar, though the person killed was a servant.[1] Another example is in the case of homicide in self-defense. If one kills an assailant, reasonably believing it necessary to save his own life, he is excused, though there may not in fact have been any such necessity.[2] Mistake of fact, however, is no excuse if the facts, as believed by the accused, would furnish no excuse, nor if he voluntarily closed his eyes to the truth. Thus, if one shoots at a person, and kills him, it is no defense to say that he thought he was shooting at some other person, or that he thought the gun was less heavily loaded, and intended only to wound him slightly. Here the intention is criminal.[3] So is it no defense for one who throws stones from a building into a street, where he knows people may be passing at any moment, to say that he did not know any one was passing. And if a person, negligently relying on a fact which he has no right to assume, thereby injures another, the mistake, although honest, is no excuse. Thus one who snaps a pistol at another, knowing it to be loaded, and kills him, will not be heard to say he thought the cart-

§§ 35–36. [1] Levet's Case, 1 Hale, P. C. 474; 4 Bl. Comm. 27; ante, p. 63.

[2] Post, p. 179.

[3] Post, p. 187.

ridge too old to explode.[4] This is voluntary or negligent ignorance.

Statutory Offenses.

It is competent for the legislature to define a crime in such a way as to make the existence of any state of mind immaterial;[5] in other words, to make an act criminal notwithstanding that it be done under ignorance or mistake of fact which would, at common law, furnish an excuse. Where the statute makes it an offense to do an act "knowingly," ignorance or mistake of fact is, of course, an excuse.[6] Frequently, however, the statutory definition does not furnish this guide, and the question for determination is whether the word "knowingly" is or is not to be implied.[7] In such cases the court must construe the statute, and by consideration of its scope, and the nature of the evils to be avoided, and such other matters as make the one construction or the other reasonable or unreasonable, decide whether it was the intention of the legislature that a person doing the prohibited act should do it at his peril, or that his ignorance or mistaken belief, in good faith and upon reasonable ground, should excuse him.[8] It is impossible to reconcile the decisions of different courts upon similar enactments, but to a certain extent there is substantial agreement.

There are many statutes in the nature of police regulations for the protection of the morals of the community, or for

[4] State v. Hardie, 47 Iowa, 647, 26 Am. St. Rep. 496.

[5] See Reg. v. Tolson, 23 Q. B. Div. 168, per Stephen, J.

[6] Com. v. Flannelly, 15 Gray (Mass.) 195; Smith v. State, 55 Ala. 1; Williams v. State, 23 Tex. App. 70, 3 S. W. 661; Teague v. State, 25 Tex. App. 577, 8 S. W. 667.

[7] See Steph. Hist. Cr. Law, 117.

[8] Reg. v. Tolson, supra, per Wills, J.; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496. And see, generally, cases cited under this section.

protection of the public against fraud, under which, either because it is impracticable in most cases to prove knowledge, or because it is regarded as reasonable under the circumstances that the doer of the act should take the risk of knowing the facts, it is generally held that the prohibited act is criminal, notwithstanding his ignorance or mistake.[9] Such are acts forbidding the sale of adulterated food or intoxicating liquors,[10] or forbidding their sale to habitual

[9] "I agree that, as a rule, there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this [requiring saloons to be closed on Sunday] is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, per Cooley, C. J. Halsted v. State, 41 N. J. Law, 552, 32 Am. Rep. 247. Sale of naphtha, Com. v. Wentworth, 118 Mass. 441. Sale of calf under statutory age, Com. v. Raymond, 97 Mass. 567. Carrying illegal number of passengers on steamboat, State v. Baltimore & S. Steam Co., 13 Md. 181. Taking lunatic into unlicensed house, Reg. v. Bishop, 14 Cox, Cr. Cas. 404.

[10] Com. v. Boynton, 2 Allen (Mass.) 160 (intoxicating liquors); Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. v. Goodman, 97 Mass. 117; Com. v. Smith, 103 Mass. 444; People v. Zeiger, 6 Parker, Cr. R. (N. Y.) 355; State v. Smith, 10 R. I. 258 (adulterated milk); People v. Kibler, 106 N. Y. 321, 12 N. E. 795; King v. State, 66 Miss. 502, 6 South. 188; People v. Eddy (Sup.) 12 N. Y. Supp. 628; Com. v. O'Kean, 152 Mass. 584, 26 N. E. 97. Contra, State v. Snyder, 44 Mo. App. 429; Waterbury v. Newton, 50 N. J. Law, 534, 14 Atl. 604; Com. v. Weiss, 139 Pa. 247, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182 (oleomargarine); State v. Kelly, 54 Ohio St. 166, 43 N. E. 163 (adulterated food). "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully,

drunkards or to minors,[11] under which, in most jurisdictions, knowledge that the food is adulterated or the liquors are intoxicating, or that the person to whom the sale is made is a habitual drunkard or a minor, is not essential.

Where a statute prohibits, under certain circumstances or conditions, an act in itself immoral, it is generally held that the doer is guilty if the circumstances or conditions exist, notwithstanding that he committed the act in ignorance thereof, or in the belief that they did not exist.[12] Thus,

if he violates the law he incurs the penalty." Com. v. Boynton, supra, per Hoar, J.

[11] People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; State v. Hartfiel, 24 Wis. 60; State v. Heck, 23 Minn. 549 (cf. State v. Mueller, 38 Minn. 497, 38 N. W. 691); Farmer v. People, 77 Ill. 322; McCutcheon v. People, 69 Ill. 601; State v. Hause, 71 N. C. 518; Ulrich v. Com., 6 Bush (Ky.) 400; State v. Cain, 9 W. Va. 572; State v. Baer, 37 W. Va. 1, 16 S. E. 368; Barnes v. State, 19 Conn. 398; State v. Thompson, 74 Iowa, 119, 37 N. W. 104; In re Carlson, 127 Pa. 330, 18 Atl. 8; Com. v. Zelt, 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602; State v. Bruder, 35 Mo. App. 475; State v. Farr, 34 W. Va. 84, 11 S. E. 737; Com. v. Stevens, 155 Mass. 291, 29 N. E. 508. Allowing minor to remain in billiard room or saloon, Com. v. Emmons, 98 Mass. 6; State v. Probasco, 62 Iowa, 400, 17 N. W. 607; State v. Kinkead, 57 Conn. 173, 17 Atl. 855.

Contra, Stern v. State, 53 Ga. 229, 21 Am. Rep. 266; Crabtree v. State, 30 Ohio St. 382; Brown v. State, 24 Ind. 113; Farbach v. State, 24 Ind. 77; Goetz v. State, 41 Ind. 162; Williams v. State, 48 Ind. 306; Mulreed v. State, 107 Ind. 62, 7 N. E. 884; People v. Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385; Faulks v. People, 39 Mich. 200, 33 Am. Rep. 374; Marshall v. State, 49 Ala. 21. Even in these cases a person is not excused if he merely relied on the purchaser's representations. Behler v. State, 112 Ind. 140, 13 N. E. 272.

[12] State v. Ruhl, 8 Iowa, 447; State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496; State v. Presnell, 34 N. C. 103 (selling spirituous liquor to slave, because apparently il-

where the accused was indicted under a statute which made it a crime to entice away an unmarried female under the age of 15 years for the purpose of prostitution, it was held no excuse that he honestly believed the girl was over that age, since there existed a criminal or wrongful intent notwithstanding such belief.[13] So, under a statute enacting that one who has carnal knowledge of a girl under 16 years is guilty of rape, it is not necessary to show that the accused knew, or had reason to know, that the girl was under that age.[14]

There remains a large class of enactments which are more than mere police regulations, and which forbid acts not in their nature immoral. The tendency of the courts is, on the whole, to construe such statutes as requiring the act to be done knowingly, and to admit ignorance or mistake of fact as an excuse.[15] Great conflict exists, however, in the construction placed by different courts upon similar enactments; for example, in the application of the rule to crimes

legal); State v. Dorman, 9 S. D. 528, 70 N. W. 848 (removing timber from school land; knowledge of character of land immaterial). See Reg. v. Prince, 13 Cox, Cr. Cas. 138. The rule as applied to sale of intoxicating liquor to a minor has been sustained on this ground. State v. Sasse, 6 S. D. 212, 60 N. W. 853, 55 Am. St. Rep. 834.

[13] State v. Ruhl, supra; State v. Houx, supra; People v. Dolan, 96 Cal. 315, 31 Pac. 107; State v. Johnson, 115 Mo. 480, 22 S. W. 463; Riley v. State (Miss.) 18 South. 117. Contra, under Texas statute, Mason v. State, 29 Tex. App. 24, 14 S. W. 71.

[14] Com. v. Murphy, supra.

[15] Anon., Fost. 439; Myers v. State, 1 Conn. 502 (prosecution for allowing persons to travel in hackney coach on Sunday in violation of statute excepting cases of necessity and charity); Birney v. State, 8 Ohio, 230 (under statute against harboring any black person "the property of another"; knowledge that person harbored was slave essential); Duncan v. State, 7 Humph. 148; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575 (illegal voting, in belief that accused was of age and qualified).

like bigamy and adultery. Thus, in a leading English case [16] the prisoner was convicted of bigamy under a statute enacting that "whoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony," but with a proviso that nothing in the act should "extend to any person marrying a second time whose husband or wife shall have been continually absent * * * for * * * seven years last past, and shall not have been known by such person to be living within that time." It appeared that the prisoner had remarried within seven years of the time when she last knew her husband was alive, but upon information of his death, which she believed upon reasonable grounds to be true. On appeal nine out of fifteen judges were of opinion that the conviction should be quashed, the majority holding, upon somewhat different reasoning, that the language of the statute did not exclude the application of the common-law doctrine that mere ignorance or mistake of fact is a defense. The minority based their judgment upon the plain and explicit language of the statute as conclusive evidence of the intention of the legislature. Other courts, under similar statutes, have taken the view supported by the minority in the case just referred to.[17] "It appears to us," said Shaw, C. J., in

[16] Reg. v. Tolson, 23 Q. B. Div. 168. See, also, Squire v. State, 46 Ind. 459.

[17] Com. v. Mash, 7 Metc. (Mass.) 472; Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800. On prosecution for adultery the fact that defendant believed that the woman was not in fact married to the alleged former husband, if she was so married, was no defense. Owens v. State, 94 Ala. 97, 10 South. 669. Cf. State v. Goodenow, 65 Me. 30. But a woman marrying is not guilty if she did not know of the man's former marriage. Vaughan v. State, 83 Ala. 55, 3 South. 530. Where a man, who had married a woman whose husband was liv-

such a case,[18] "that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage while the former husband or wife is in fact living depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death."

ACCIDENT OR MISFORTUNE.

37. A person is not criminally liable for an accident happening in the performance of a lawful act with due care.

The ground of this exemption from responsibility is the absence of will. The law does not punish one for his involuntary acts unless he is negligent. The accident, however, must happen in doing a lawful act. If it happen in the doing of a criminal act, there is no exemption. Thus, if a person, intending to kill one person, accidentally kills another,[1] or if he accidentally kills a person in attempting to rob or commit any other felony,[2] the fact that the killing was

ing, was indicted for adultery, and it appeared that the former husband had been absent for the full seven years covered by the exception in the statute against bigamy, it was held that, if defendant believed him dead, he was not guilty, since the statute, though not in terms applicable to adultery, recognized the common-law rule that upon a person's leaving home for temporary purposes, and not being heard of or known to be living for seven years, the presumption of death arises, and this rule should operate as a defense. Com. v. Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653. But where it appeared on a second trial that the woman's husband had not left her, but she had deserted him, the presumption did not apply, and defendant's belief in the husband's death was no defense. Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

[18] Com. v. Mash, supra.

§ 37. [1] Saunders' Case, 2 Plowd. 473; Gore's Case, 9 Coke, 81. See 4 Bl. Comm. 26, 27.

[2] Post, p. 191.

accidental is no excuse. So if a person accidentally kills another while engaged in mutual combat, amounting to a breach of the peace, he is guilty of manslaughter if he was voluntarily fighting, as the fighting is an unlawful act; but if he did not wish to fight, and was merely defending himself, as he had a right to do, he is excused on the ground of accident.[3] Even if the accident happen in the doing of a lawful act, the person so causing it is liable if he failed to use proper care.[4] This ground of exemption will be more fully explained in treating of the specific crimes of assault and battery and homicide.

JUSTIFICATION.

38. Although an act ordinarily criminal be intentionally committed, it may fail of being a crime because by reason of particular circumstances the law deems it justifiable or excusable. Acts which would otherwise be criminal may be justifiable or excusable if done—

(a) Under public authority.
(b) Under parental authority.
(c) In prevention of crime.
(d) In suppressing a riot.
(e) In defense of person or property.
(f) In making an arrest or preventing an escape.
(g) Under duress, coercion, or necessity.

In General.

Questions of justification or excuse usually arise in connection with the right to inflict personal injury or to cause death. For example, homicide may be justifiable in the execution of criminals, in making arrest, in preventing the escape or rescue of a prisoner, in preventing crime, in suppressing riot or affray, in self-defense, in defense of others, or in defense of property. The infliction of bodily in-

[3] Reg. v. Knock, 14 Cox, Cr. Cas. 1. And see post, pp. 177, 205, and cases cited.

[4] Ante, p. 56. Post, p. 207.

jury may be justified under similar circumstances, as well as under some other circumstances,—as in the case of correction administered by a parent to his child, a teacher to his pupil, and the like. Questions of justification of this nature will be considered hereafter, particularly in treating of homicide [1] and assault.[2] At present the subject will be considered only with reference to what may be called roughly duress, coercion, and necessity.

SAME—DURESS.

39. When any crime, except murder, is committed, aided or participated in by two or more persons, and is committed, aided or participated in by one of them only because during the time of the commission he is compelled to do so by threats of one or more of the others, and reasonable apprehension of instant death in case he refuses, the threats and apprehension constitute duress, and excuse him.

If a man, without fault on his part, is made to do an act under the influence of a force which it is impossible to resist, or, rather, under the influence of such a force is made the involuntary instrument of another's act, he is, of course, not responsible. One is not guilty if a man seizes his hand, and, in spite of his resistance, compels him to kill another, for the act is the act of the man who directs his hand.[1] Did the question stop here, there would be no difficulty; but the law goes farther, and excuses or justifies in certain cases acts which are not strictly involuntary. If a man's life is threatened or put in danger, or he is threatened with grievous bodily harm, he may, as we shall see, defend himself. But the question here involved is whether reasonable apprehension of death or bodily harm, in case

§ 38. [1] Post, pp. 160, 176.

[2] Post, p. 237.

§ 39. [1] East, P. C. 225.

the command of another to commit a crime is refused, is a justification or excuse for committing the crime.

At common law it is a rule that a man is excused if he commits a crime upon command of another under reasonable apprehension on his part of instant death in case compliance with the command is refused. Such threats and apprehension constitute duress, and excuse him. Thus, where the defendant was charged with joining in a rebellion, and of acting as lieutenant in a rebel army, and the defense was coercion on the part of the Duke of Perth, whose tenant he was, in that the duke had threatened to burn the houses and drive off the cattle of those of his tenants who refused to join him, the court charged that the fear of having houses burned or goods spoiled was no excuse, but that the only force that would excuse was force upon the person, and present fear of death, and that this force must have continued all the time the prisoner remained with the rebels.[2] Fear of injury to property, or, it seems, of anything short of death, will not excuse.[3] Nor, apparently, is duress an excuse for taking life.[4]

Same—Command.

It is no excuse for the commission of a crime that it was done under the command of another. The authority of an agent cannot rise higher than its source.[5] If the act commanded is a crime, it would be such if committed by the

[2] McGrowther's Case, Fost. 13, 18 How. St. Tr. 394.

[3] McGrowther's Case, supra; Respublica v. McCarty, 2 Dall. (Pa.) 86, 1 L. Ed. 300; Reg. v. Tyler, 8 Car. & P. 616; Rex v. Crutchley, 5 Car. & P. 133; People v. Repke, 103 Mich. 459, 61 N. W. 861. But see, as to threats to do grievous bodily harm, Steph. Dig. Cr. Law, art. 31.

[4] Arp v. State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137. See Pen. Code, Minn. § 23.

[5] See Reg. v. Leslie, 8 Cox, Cr. Cas. 269.

person commanding, and it is no less a crime if done by another pursuant to command. Thus, a command by a superior officer does not excuse an inferior, either in the army or the navy, or in civil life, for committing a criminal act.[6] And the rule, of course, applies to a crime committed by a servant by command of his master,[7] and even by a child by command of his parent.[8] A somewhat different rule, as will be seen, applies to crimes committed by a married woman in the presence of her husband.[9]

SAME—COERCION—MARRIED WOMEN.

40. If a married woman, in the presence of her husband, commits an act which would be a crime under other circumstances, she is presumed to have acted under her husband's coercion, and such coercion excuses her act,[1] but this presumption may be rebutted if the circumstances show that in fact she was not coerced.

EXCEPTIONS—This rule is subject to exceptions in cases of treason, murder, probably robbery, and of those crimes which are from their nature generally committed by women.

The ground on which a married woman is prima facie not criminally liable for wrongful acts in the presence of her husband is coercion, it being presumed from the marital

[6] U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; U. S. v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732; Com. v. Blodgett, 12 Metc. (Mass.) 56.

[7] Com. v. Hadley, 11 Metc. (Mass.) 66; Sanders v. State (Tex. Cr. App.) 26 S. W. 62.

[8] 1 Hawk. P. C. c. 1, § 14; People v. Richmond, 29 Cal. 415.

[9] Post, § 40.

§ 40. [1] J. Kel. (A. D. 1664) 31; Reg. v. Dykes, 15 Cox, Cr. Cas. 771; Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559; State v. Kelly, 74 Iowa, 589, 38 N. W. 503; State v. Houston, 29 S. C. 108, 6 S. E. 943. Under Georgia Code, see Bell v. State, 92 Ga. 49, 18 S. E. 186.

relation that she acted by his command, and under the impulse of fear. She must, however, have been in his presence, or so near that he could have exerted an immediate influence and control.[2] It is doubtful what crimes are excepted from this rule. It seems, however, that it does not apply to treason, murder, or robbery,[3] nor to crimes of a domestic nature, such as keeping a bawdy house, in which the wife may be supposed to have a principal share.[4] The presumption is always rebuttable by evidence showing that there was no coercion.[5] In one state, at least, this presumption is not recognized, but the burden of proving coercion is by statute cast upon the wife.[6] This common-law rule as to a

[2] Com. v. Butler, 1 Allen (Mass.) 4; Com. v. Feeney, 13 Allen (Mass.) 560; Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Munsey, 112 Mass. 287; State v. Potter, 42 Vt. 495; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684. Mere proximity not sufficient. State v. Shee, 13 R. I. 535; Com. v. Daley, 148 Mass. 11, 18 N. E. 579. Must appear that "violent threats, command, and coercion were used" (under Code). Bell v. State, 92 Ga. 49, 18 S. E. 186.

[3] J. Kel. 31; Bibb v. State, 94 Ala. 31, 10 South. 506, 33 Am. St. Rep. 88; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559. Contra as to robbery. Reg. v. Dykes, 15 Cox, Cr. Cas. 771. And see People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; Miller v. State, 25 Wis. 384; Com. v. Daley, 148 Mass. 11, 18 N. E. 579. No presumption in perjury, where wife testified in favor of husband on indictment against him, she not being compellable to testify. Com. v. Moore, 162 Mass. 441, 38 N. E. 1120.

[4] 4 Bl. Comm. 29.

[5] Blakeslee v. Tyler, 55 Conn. 397, 11 Atl. 855; U. S. v. Terry (D. C.) 42 Fed. 317; People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; Com. v. Daley, 148 Mass. 11, 18 N. E. 579; Miller v. State, 25 Wis. 384; State v. Williams, 65 N. C. 400; State v. Baker, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414. By slight circumstances, State v. Cleaves, 59 Me. 302, 8 Am. Rep. 422. May be shown that husband was crippled and incapable of coercion, Reg. v. Pollard, 8 Car. & P. 553.

[6] Freel v. State, 21 Ark. 212; Edwards v. State, 27 Ark. 493.

married woman's criminal responsibility is not changed by the married women's acts in the different states, removing their civil disabilities; but in some states it is expressly enacted that it is no defense that a criminal act was committed by her in the presence of her husband.[7]

SAME—NECESSITY.

41. Physical necessity or impossibility is an excuse for failure to perform a duty imposed by law. How far an act which would otherwise be a crime may be excused if done, not in defense, but to avoid otherwise inevitable consequences, which would inflict upon him or others whom he is bound to protect irreparable evil, is doubtful. It seems that no man can, on the plea of necessity, excuse himself for taking the life of an innocent person.

It is doubtful how far the mere pressure of circumstances, as distinct from duress or coercion as above explained (except the circumstances which will be hereafter considered in treating of justification and excuse of homicide and of assault), is a justification for the commission of otherwise criminal acts.[1] It is probably the law that no man can excuse himself under the plea of necessity for taking the

[7] Pen. Code, Minn. § 22.

§ 41. [1] "An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided." Steph. Dig. Cr. Law, art. 32, citing Rex v. Stratton, 21 How. St. Tr. 1045, Bac. Max. No. 5, and (with some adverse comment) Com. v. Holmes, infra. See criticisms upon this article and upon the cases cited by Lord Coleridge in Reg. v. Dudley, infra.

life of an innocent person.[2] Lord Bacon, indeed, in his Maxims, states that: "If divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, * * * and another, to save his life, thrust him from it, whereby he is drowned, this is * * * justifiable." [3] But this statement of the law was disapproved by the English court in a case where it was held that shipwrecked persons, who put to death a boy upon the chance of preserving their lives by feeding upon the body, although otherwise they would probably not have survived, and the boy, being in a weak condition, was likely to have died before them, were guilty of murder.[4] A somewhat similar case had previously arisen in this country, where a sailor was charged with felonious homicide in throwing passengers out of a boat to save his life. The court said that, if two persons who owe no duty to one another, should be placed in a position where both cannot survive, neither would commit a crime in saving his life in a struggle for the only means of safety; but the court held that, as the defendant was a seaman, and the persons thrown out were passengers, the defendant owed them a duty, and was not justified in sacrificing their lives to save his own.[5]

Lord Bacon also says that, "if a man steals viands to sat-

[2] Reg. v. Dudley, 15 Cox, Cr. Cas. 624, 14 Q. B. Div. 273; Arp v. State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137. But see U. S. v. Holmes, 1 Wall. Jr. 1, Fed. Cas. No. 15,383.

[3] Bac. Max. No. 5.

[4] Reg. v. Dudley, supra.

[5] U. S. v. Holmes, supra. The court also said: "When a ship is in danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary in order to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God for the selection of the victim." "I doubt whether an English court would take this view. It would be odd to say that two men on a raft were

isfy his present hunger, this is no felony nor larceny";[6] but this is probably not the law at the present day.[7] It has been held, however, on an indictment for retailing spirituous liquors without a license, where it appeared that the sale was made by druggists on a physician's prescription, and was bought, sold, and used in good faith as medicine, that the defendant was not guilty, on the ground that the sale was not within the mischief which the statute was intended to suppress.[8]

Physical necessity or impossibility, however, is an excuse for failure to perform a duty. Thus, where the defendant was indicted for failure to repair a highway which it was his duty to repair, and it appeared that the land over which the road passed had been washed away by the sea, it was held that this, being an act of God, relieved him from liability.[9]

PROVOCATION.

42. Provocation is no ground for exempting one absolutely from criminal responsibility for his acts, but may be ground for mitigating the punishment.

A person who commits a crime cannot escape liability altogether by showing that he was provoked; but the fact that a crime was committed under provocation may sometimes be ground for inflicting less severe punishment in cases of homicide and assault. The law in these cases regards the infirmities of human nature, and recognizes the

bound to toss up as to which should go." Steph. Dig. Cr. Law, art. 32, note 1.

[6] Bac. Max., supra.

[7] 1 Hale, P. C. 54. See opinion of Lord Coleridge in Reg. v. Dudley, supra.

[8] State v. Wray, 72 N. C. 253.

[9] Reg. v. Bamber, 5 Q. B. 279. See, also, Com. v. Brooks, 99 Mass. 434.

fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, he may strike a blow before he has had time to think and to control himself, and therefore does not punish him so severely as if he had acted deliberately. This is a matter relating more peculiarly to homicide, and will be fully explained when we come to treat of homicide.[1]

§ 42. [1] Post, p. 197.

CHAPTER VI.

PARTIES CONCERNED IN THE COMMISSION OF CRIMES.

EFFECT OF JOINING IN CRIMINAL PURPOSE.

43. Where several persons join in the execution of a common criminal purpose, each is criminally liable for every act done in the execution of that purpose.[1]

A crime is not always committed by a single individual, but several persons may be concerned in different degrees, some of them by actually doing the deed, others by standing by and abetting it, others by having advised or commanded it, though absent when it is committed, and still others by assisting in the escape of one concerned. Whenever persons join for the purpose of executing a common criminal purpose, each one is the agent of the other as to all acts in furtherance thereof, and each is criminally liable for such acts of the others. It is otherwise, however, as to acts not in furtherance of the common purpose. This, of course, does not apply to persons assisting after the act. We will now see what these degrees of criminality are, the

§ 43. [1] Spies v. People, 122 Ill. 1, 12 N. E. 865. See, also, post, pp. 105, 110, 149.

extent of participation necessary to render one liable, the acts for which each participant is liable, and the nature of his liability.

PRINCIPALS AND ACCESSARIES.

44. Parties concerned in the commission of felonies are principals or accessaries according as they are present or absent when the act is committed, and are further divided into:

(1) Principals in the first degree, and

(2) Principals in the second degree.

(3) Accessaries before the fact, and

(4) Accessaries after the fact.

45. This distinction is recognized in felonies only.

This distinction between principals and accessaries is recognized in felonies only.[1] The same participation or assistance which in case of a felony would make one an accessary before or after the fact will make him a principal in treason. In case of a misdemeanor, all those who counsel or abet its commission, and who would be accessaries before the fact if the crime were a felony, are treated as principals;[2]

§§ 44–45. [1] 2 Co. Inst. 183; 1 Hale, P. C. 233; 4 Bl. Comm. 35; Reg. v. Clayton, 1 Car. & K. 128; Ward v. People, 6 Hill (N. Y.) 144; Baker v. State, 12 Ohio St. 214; Van Meter v. People, 60 Ill. 168; Stevens v. People, 67 Ill. 587; Stratton v. State, 45 Ind. 468; State v. Jones, 83 N. C. 605; State v. Murdoch, 71 Me. 454; State v. Lymburn, 1 Brev. (S. C.) 397, 2 Am. Dec. 669; Com. v. Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693; State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459; Engeman v. State, 54 N. J. Law, 247, 23 Atl. 676; Kinnebrew v. State, 80 Ga. 232, 5 S. E. 56. This principle applies to actions for penalties for breach of municipal ordinances. Village of St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. Rep. 699.

[2] Blackstone says that in treason all are principals propter odium delicti, and in misdemeanors, because the law does not descend to distinguish the different degrees of guilt. 4 Bl. Comm. 36.

while those who assist after the act, and who would be accessaries after the fact in case of a felony, are not punished at all for the particular misdemeanor. They may, however, be guilty of other substantive crimes, such as rescue and obstructing an officer.

PRINCIPALS IN THE FIRST DEGREE.

46. A principal in the first degree is the person who actually perpetrates the deed, either by his own hand or through an innocent agent.[1]

To constitute one a principal in the first degree, he need not necessarily be present when the crime is consummated. One who lays poison [2] or sets a spring gun for another is a principal in the first degree, though he is absent when the poison is drunk or the gun discharged. Nor need he do the deed by his own hand. It may be done through an innocent agent, as, for instance, where one incites a child or an insane person to set fire to a house or to kill another, or procures such a person, or a person ignorant of the facts, to administer poison,[3] or to utter a counterfeit bank note or a forged instrument.[4] If the person thus employed is of sufficient mental capacity, and has sufficient knowledge of

§ 46. [1] 4 Bl. Comm. 34, 35; 1 Hale, P. C. 615.

[2] 3 Co. Inst. 138; Fost. Crown Law, 349; State v. Fulkerson, 61 N. C. 233; Blackburn v. State, 23 Ohio St. 146.

[3] Reg. v. Michael, 2 Moody, Cr. Cas. 120; Collins v. State, 3 Heisk. (Tenn.) 14.

[4] Reg. v. Taylor, 4 Fost. & F. 511; Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34. Procuring instrument to be forged, or die made for counterfeiting, Reg. v. Banner, 2 Moody, Cr. Cas. 309; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774; State v. Shurtliff, 18 Me. 368. Procuring child to commit burglary or larceny, Reg. v. Manley, 1 Cox, Cr. Cas. 104; State v. Learnard, 41 Vt. 585. Obtaining property by false pretenses, through innocent agent, Adams v. People, 1 N. Y. 173.

the facts, to be himself guilty of the crime, the instigator is only an accessary before the fact. When one acts through an agent, he can himself be guilty as a principal in the first degree only where the agent is innocent.[5] Where several persons each perform some one or more of a series of acts necessary to constitute the crime intended, as in case of counterfeiting or forging, all are joint principals in the first degree, though some may be absent when the final act is done.[6] A person in one state, committing an act in another state through an innocent agent, is liable, as having himself committed the act in the latter state.[7]

PRINCIPALS IN THE SECOND DEGREE.

47. A principal in the second degree is one who is actually or constructively present, aiding and abetting the commission of the deed.[1]

(a) He must be present, actually or constructively, and

(b) He must aid or abet the commission of the act.

(c) There must be community of unlawful purpose at the time the act is committed.

(d) Such purpose must be real on the part of the principal in the first degree.

Constructive Presence.

Though presence at the time the deed is done is essential to make one a principal in the second degree,[2] his pres-

[5] Wixson v. People, 5 Parker, Cr. R. (N. Y.) 129.

[6] Rex v. Bingley, Russ. & R. 446; Rex v. Kirkwood, 1 Moody, Cr. Cas. 304. Stealing property, carrying away part in confederate's absence, Reg. v. Kelly, 2 Car. & K. 379. Uttering forged checks, Mason v. State, 31 Tex. Cr. R. 306, 20 S. W. 564.

[7] People v. Adams, 3 Denio (N. Y.) 190. See Clark, Cr. Proc. 14.

§ 47. [1] 4 Bl. Comm. 34, 35; 1 Hale, P. C. 615.

[2] Rex v. Soares, Russ. & R. 25; Wixson v. People, 5 Parker, Cr. R. (N. Y.) 129.

ence may be constructive.[3] He need not be an eye and ear witness to the deed. Thus, if a person intends to assist, and is sufficiently near to do so, as where he is watching outside a house, while another is committing a burglary or other felony inside, he is regarded as being present.[4] So, also, if he is within a convenient distance, with intent to aid in a murder if his aid is necessary.[5] For the purpose of robbing a stage, a person signaled his confederates, to inform them of its approach, by lighting a fire on a distant mountain. He was held to have been constructively present, and a principal in the second degree.[6] So, also, where a person decoyed the owner of a house to another place, and detained him there while his confederates committed a burglary in the house.[7] A person, if present, must be a principal, if guilty at all. He cannot be an accessary;[8] for, as we shall see, absence is essential to make one an accessary.

Aiding and Abetting.

To aid or abet the commission of a crime is to assist or encourage the actual perpetrator. There must be some participation.[9] Mere presence and neglect to endeavor to

[3] Fost. Crown Law, 349, 350; U. S. v. Boyd (C. C.) 45 Fed. 851, at page 867.

[4] Com. v. Knapp, 9 Pick. (Mass.) 496, at page 516, 20 Am. Dec. 491; Tate v. State, 6 Blackf. (Ind.) 110; Doan v. State, 26 Ind. 495; Mitchell v. Com., 33 Grat. (Va.) 845; Collins v. State, 88 Ga. 347, 14 S. E. 474; People v. Repke, 103 Mich. 459, 61 N. W. 861; Com. v. Clune, 162 Mass. 206, 38 N. E. 435.

[5] State v. Chastain, 104 N. C. 900, 10 S. E. 519.

[6] State v. Hamilton, 13 Nev. 386.

[7] Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340.

[8] Williams v. State, 47 Ind. 568.

[9] A boy was negligently shot by one of several persons who went out together to shoot at a mark. The others were held liable as principals in the second degree. Reg. v. Salmon, 6 Q. B. Div. 79. Picking of a pocket by one of several confederates, Com. v. For-

prevent a felony will not of itself make one a principal in the second degree;[10] and this is true even though the person so present is to be benefited by the deed. Presence, under such circumstances, however, might raise the presumption of participation.[11] Nor will mere mental approval or sympathy make one guilty.[12] If, however, it is a person's legal, as distinguished from his moral, duty to interfere, as in case of a bank watchman, and, by doing so, he can prevent

tune, 105 Mass. 592. And see, for larceny from the person, People v. Sligh, 48 Mich. 54, 11 N. W. 782; encouraging obstruction of railroad track, State v. Douglass (Kan.) 24 Pac. 1118; murder, commanding another to shoot, State v. Noeninger, 108 Mo. 166, 18 S. W. 990; preparing to receive property to be stolen, and receiving the same, (under statute,) Watson v. State, 21 Tex. App. 598, 17 S. W. 550; Montgomery v. State (Tex. Cr. App.) 23 S. W. 693. And see Wixson v. People, 5 Parker, Cr. R. (N. Y.) 119. But see, contra, Atterberry v. State, 56 Ark. 515, 20 S. W. 411. Prisoner accepting means of escape not accomplice of person furnishing the same. Ash v. State, 81 Ala. 76, 1 South. 558. The woman is not an accomplice in abortion, Peoples v. Com., 87 Ky. 487, 9 S. W. 509; nor is a female friend who accompanies the woman, People v. McGonegal, 136 N. Y. 62, 32 N. E. 616. Aider actuated by threats and fear, danger must be to life or member, and must be present and immediate, Burns v. State, 89 Ga. 527, 15 S. E. 748. Purchaser of lottery ticket not an accomplice of the seller, People v. Emerson, 6 N. Y. Cr. R. 157, 5 N. Y. Supp. 374; nor is purchaser of liquor an accomplice of seller, People v. Smith, 28 Hun (N. Y.) 627; Com. v. Willard, 22 Pick. (Mass.) 476; State v. Baden, 37 Minn. 212, 34 N. W. 24.

[10] Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370; Hilmes v. Stroebel, 59 Wis. 74, 17 N. W. 539; People v. Ah Ping, 27 Cal. 489; People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176; Clem v. State, 33 Ind. 418; State v. Farr, 33 Iowa, 553; State v. Hildreth, 31 N. C. 440, 51 Am. Dec. 369; State v. Douglass, 44 Kan. 618, 26 Pac. 476; Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

[11] Com. v. Stevens, 10 Mass. 181.

[12] White v. People, 81 Ill. 333; State v. Cox, 65 Mo. 29; Clem v. State, 33 Ind. 418; True v. Com., 90 Ky. 651, 14 S. W. 684.

a felony about to be committed, his failure to interfere aids the commission of the crime, and he is guilty. The assistance need not be physical, but may consist in mere encouragement.[13] Thus, it is sufficient to make one a principal if he watches so as to warn the person actually committing the deed, or if he is present, or near by, to the actual perpetrator's knowledge, with an intention of assisting him if necessary.[14] So, also, a person may be guilty of rape as principal in the second degree if he stands by and encourages the actual ravisher.[15] One may be guilty as principal in the second degree though he could not possibly perpetrate the deed himself. A woman, for instance, may be so guilty of rape if she encourages another to commit it.[16]

Community of Unlawful Purpose.

As stated in the black-letter text, there must also be a community of unlawful purpose at the time the act is committed.[17] Acts done by one of a party, but not in pursuance of the arrangement, will not render the others liable as principals.[18] Thus, if two persons start out to com-

[13] Mitchell v. Com. (Ky.) 14 S. W. 489.

[14] See cases cited in footnotes 4 and 5.

[15] People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176; People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; Kessler v. Com., 12 Bush (Ky.) 18. So of embezzlement by public officer. State v. Rowe, 104 Iowa, 323, 73 N. W. 833.

[16] State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; Kessler v. Com., 12 Bush (Ky.) 18.

[17] Intention not communicated to principal in first degree is not sufficient. White v. People, 139 Ill. 143, 28 N. E. 1083, 32 Am. St. Rep. 196. The common purpose need not be formed before convening at place of crime. Amos v. State, 83 Ala. 1, 3 South. 749, 3 Am. St. Rep. 682.

[18] Ferguson v. State, 32 Ga. 658. Joining to commit assault, not liable for robbery. People v. Foley, 59 Mich. 553, 26 N. W. 699;

mit a burglary or robbery, and on the way one of them kills a man,[19] or sets fire to a house, or, in escaping, one of them maims or kills an officer or other person, to prevent being taken, the other, not having contemplated such an act, is not a principal.[20] It would be otherwise, though, if the act done were a probable consequence of the execution of the common unlawful purpose.[21] Thus, where two persons start out to commit a burglary or robbery, and, encountering resistance from the owner of the house or person to be robbed, one of them kills him, the other is a principal in the murder.[22] So, also, where several persons start out to beat a man, and one of them kills him, they are all principals.[23] The community of unlawful purpose must exist at the time the felony is committed. If one joins in an arrangement to murder, but, before the deed is committed, repents, and endeavors to prevent it, he is not a principal in the murder. Nor is one a principal who, after a robbery

Omer v. Com., 95 Ky. 353, 25 S. W. 594; State v. May, 142 Mo. 135, 43 S. W. 637.

[19] Duffey's Case, 1 Lewin, Cr. Cas. 194.

[20] Rex v. White, Russ. & R. 99; Lamb v. People, 96 Ill. 73; People v. Knapp, 26 Mich. 112. Contra, in case of killing to conceal robbery, State v. Davis, 87 N. C. 514.

[21] Common purpose to set the law at defiance, manslaughter by one, Martin v. State, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91.

[22] Fost. Crown Law, 369; Reg. v. Jackson, 7 Cox, Cr. Cas. 357; Ruloff v. People, 45 N. Y. 213; Miller v. State, 25 Wis. 384; Mitchell v. Com., 33 Grat. (Va.) 845; State v. Barrett, 40 Minn. 77, 41 N. W. 463; Brennan v. People, 15 Ill. 511; State v. Johnson, 7 Or. 210; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[23] Peden v. State, 61 Miss. 268. Common purpose to kill one man; all guilty if one of them, in the attempt, kills the wrong man. State v. Johnson, 7 Or. 210. Person becoming involved in a fight not on that ground alone an aider and abettor of a homicide by another person. Woolweaver v. State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667.

has been committed, and the stolen property has been carried some distance, is told of the robbery, and helps carry the property away, as the robbery is complete before he assists.[24]

As stated in the black-letter text, the unlawful purpose must be real on the part of the principal in the first degree; that is, it must be such that, when he perpetrates the deed, he himself will also be criminally liable. This question will arise where a person apparently enters into a confederacy for the purpose of entrapping his confederate, and is not guilty when he commits the act, because of his want of criminal intent.[25] A person joining another for the purpose of entrapping, as in the case of detectives, does not become a principal in the second degree, nor accessary before the fact, when the crime is committed by his confederate.[26] Where a specific intent is an essential ingredient of the crime with which one is charged as principal in the second degree, as, for instance, in assault with intent to murder, it must be shown that the accused knew that the principal in the first degree had such an intent. It is not enough to show that he aided him in his act.[27]

[24] Rex v. King, Russ. & R. 332.

[25] Ante, p. 11, and cases cited. People v. Collins, 53 Cal. 185; State v. Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360; State v. Jansen, 22 Kan. 498.

[26] People v. Barric, 49 Cal. 342; People v. Bolanger, 71 Cal. 17, 11 Pac. 799; Price v. People, 109 Ill. 109; Campbell v. Com., 84 Pa. 187; Com. v. Downing, 4 Gray (Mass.) 29; State v. Anone, 2 Nott & McC. (S. C.) 27; Com. v. Hollister, 157 Pa. 13, 27 Atl. 386, 25 L. R. A. 349; State v. McKean, 36 Iowa, 343, 14 Am. Rep. 530; State v. Beaucleigh, 92 Mo. 490, 4 S. W. 666. Policeman frequenting gaming house, and afterwards exposing it, not an accomplice. Com. v. Baker, 155 Mass. 287, 29 N. E. 512.

[27] Reg. v. Cruse, 8 Car. & P. 546; State v. Taylor, 70 Vt. 1, 39 Atl. 447, 42 L. R. A. 673, 67 Am. St. Rep. 648. And see Meister v. People, 31 Mich. 99.

Punishment and Procedure.

This distinction between principals in the first and in the second degree has been almost obliterated, but in some states there are statutes prescribing different punishments; and, where such is the case, a principal in the second degree must be indicted and tried as such. In the absence of such a statute, the distinction need not be made.[28] There is an exception to this rule in the case of rape. Persons present, aiding and abetting a rape, must be indicted as principals in the second degree.[29] A principal in the second degree may be punished without having first tried and convicted the principal in the first degree;[30] and it seems that he may be convicted of a higher offense than the principal in the first degree, of murder, for instance, where the latter has been convicted of manslaughter only.[31]

[28] Huffman v. Com., 6 Rand. (Va.) 685; Warden v. State, 24 Ohio St. 143; Williams v. State, 47 Ind. 568; Com. v. Fortune, 105 Mass. 592; Hill v. State, 28 Ga. 604; Leonard v. State, 77 Ga. 764; Collins v. State, 88 Ga. 347, 14 S. E. 474; State v. Ross, 29 Mo. 32; People v. Ah Fat, 48 Cal. 62; State v. Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583; People v. Wright, 90 Mich. 362, 51 N. W. 517; Benge v. Com., 92 Ky. 1, 17 S. W. 146; Albritton v. State, 32 Fla. 358, 13 South. 955; Clark, Cr. Proc. 156.

[29] Kessler v. Com., 12 Bush (Ky.) 18.

[30] Brown v. State, 28 Ga. 216; Searles v. State, 6 Ohio Cir. Ct. R. 331; State v. Anderson, 89 Mo. 312, 1 S. W. 135.

[31] Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

ACCESSARIES BEFORE THE FACT.

48. An accessary before the fact is one who was absent [1] when the act was committed, but who procured, counseled, commanded, or abetted the principal or actual doer of the act to commit it.[2]

To abet a crime is to incite or set another on to commit it, and includes procuring, counseling, and commanding its commission. There must be some participation or instigation to make one an accessary.[3] The bare concealment of the fact that a felony is about to be committed,[4] or the failure to endeavor to prevent it, is not sufficient, although it may make one guilty of a substantive crime. While there must be some communication between an accessary and the principal, it need not be direct, but may be through a third person, as where one procures another to procure a third person to commit a crime; and in such case it is not even necessary that he know who the third person is to be.[5] Nor does it make any difference how long a time may elapse

§ 48. [1] If present, he cannot be accessary. Williams v. State, 47 Ind. 568; Reg. v. Brown, 14 Cox, Cr. Cas. 144.

[2] 2 Hawk. P. C. c. 29, § 16; Reg. v. Brown, 14 Cox, Cr. Cas. 144. May be accessary before the fact to murder in second degree. Jones v. State, 13 Tex. 168, 62 Am. Dec. 550. Conspiracy to rob, person guilty who entered into the agreement, though he received none of the property. Com. v. Hollister, 157 Pa. 13, 27 Atl. 386, 25 L. R. A. 349.

[3] Mere previous approval not enough. People v. McGuire, 135 N. Y. 639, 32 N. E. 146.

[4] Smith v. State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; State v. Roberts, 15 Or. 187, 13 Pac. 896; Edmonson v. State, 51 Ark. 115, 10 S. W. 21; Alford v. State, 31 Tex. Cr. R. 299, 20 S. W. 553; Elizando v. State, 31 Tex. Cr. R. 237, 20 S. W. 560.

[5] Rex v. Cooper, 5 Car. & P. 535; Rex v. Kirkwood, 1 Moody, Cr. Cas. 304.

between the counsel or command and the commission of the act, so long as the counsel or command instigates the commission.

For What Acts Accessary Answerable.[6]

A person is answerable as accessary before the fact for all probable consequences which ensue from his counsel or command to do an unlawful act, but he is not liable if the act done is essentially different from that counseled or commanded.[7] Thus, if one counsels another to beat a person, and the beating results in death, the person so counseling is an accessary to the killing; but one who commands the burning of another's house is not liable as an accessary if the person commanded breaks into the house and steals therefrom. A mere difference, however, in the manner of doing the felony commanded, does not exempt from liability as accessary, if the felony is the same in substance. Thus, one counseling the killing of another by shooting is an accessary, though the killing is done with a knife or by poison.[8] But if a person advises another to give poison to a particular person, and it is given to a different person, he is not an accessary to the murder.[9] There can be no accessary to a felony unless the felony is in fact committed,[10] though the

[6] Command to murder, principal's act need not be "direct and immediate" cause of the death. Sage v. State, 127 Ind. 15, 26 N. E. 667.

[7] The doctrine as to community of purpose is discussed in reference to principals in the second degree, and is equally applicable to accessaries before the fact. See ante, p. 105, and the cases cited. See, also, State v. Lucas, 55 Iowa, 321, 7 N. W. 583. Accessary counseling assault and maiming not liable where rape is committed. Watts v. State, 5 W. Va. 532.

[8] Fost. Cr. Law, 370; Griffith v. State, 90 Ala. 583, 8 South. 812.

[9] 1 Hale, P. C. 618; Saunders' Case, 2 Plowd. 473.

[10] Reg. v. Gregory, L. R. 1 Cr. Cas. 79.

adviser may be punished for soliciting its commission,[11] or for conspiracy.[12] It is sometimes said that there cannot be an accessary before the fact to manslaughter, as manslaughter is a crime which must necessarily be committed without premeditation. This is no doubt true where the manslaughter is intentional, as in case of a killing in heat of passion caused by provocation;[13] but there is no reason why there may not be an accessary to manslaughter unintentionally committed in doing an unlawful act.[14]

Repentance and Withdrawal.

The fact that one who has counseled commission of a crime, or agreed to take part in it, repents, and withdraws his advice, and abandons the purpose, may or may not relieve him from liability. If he does so when it is too late to prevent the crime, he is nevertheless guilty as accessary, but if he does so before his advice is acted on in any way, or if he does all in his power to prevent it, and his efforts are unavailing because some new cause intervenes, he is not guilty. Mere disapproval, however, after having counseled a crime, without any effort to prevent its commission, or mere withdrawal without the knowledge of his confederate, will not relieve him.[15] This applies to persons participating in misdemeanors, and who are principals.

Punishment and Procedure.

At common law, an accessary before the fact must be indicted and prosecuted as such, and this is true even where by statute he is made punishable as principal;[16] but in some states there are statutes which provide that an ac-

11 Post, p. 140

12 Post, p. 142.

13 Post, p. 197.

14 Post, p. 211.

15 State v. Allen, 47 Conn. 121; Pinkard v. State, 30 Ga. 757.

16 Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410; Meister v. People, 31 Mich. 99; State v. Larkin, 49 N. H. 39; Walrath v.

cessary before the fact shall be deemed a principal, and punished as such. In this case, he may be indicted and convicted as principal, the distinction being abolished.[17] An accessary cannot be put upon his trial, at common law, except by his own consent, until the conviction of the principal; or, at least, he must be tried jointly with the principal, and the latter must be first convicted; and if the principal is dead, or cannot be apprehended, the accessary cannot be punished at all.[18] Where, however, the distinction has been abolished by statute, as it has been now in most of the states, an accessary may be tried without regard to the principal.[19] An accessary, in any event, may be tried and convicted when

State, 8 Neb. 80; Hughes v. State, 12 Ala. 458; Josephine v. State, 39 Miss. 613; State v. Dewer, 65 N. C. 572; People v. Trim, 39 Cal. 75; People v. Campbell, 40 Cal. 129.

[17] Campbell v. Com., 84 Pa. 187; People v. Davidson, 5 Cal. 134; State v. Zeibart, 40 Iowa, 169; State v. Pugsley, 75 Iowa, 742, 38 N. W. 498; Dempsey v. People, 47 Ill. 323; Coates v. People, 72 Ill. 304; State v. Beebe, 17 Minn. 241 (Gil. 218); Pettes v. Com., 126 Mass. 242; Wade v. State, 71 Ind. 535; Shannon v. People, 5 Mich. 71; Smith v. State, 21 Tex. App. 107, 17 S. W. 552; State v. Orrick, 106 Mo. 111, 17 S. W. 176; People v. Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701; State v. Patterson, 52 Kan. 335, 34 Pac. 784.

[18] Com. v. Phillips, 16 Mass. 423; Stoops v. Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482; Brown v. State, 18 Ohio St. 496, at page 508; U. S. v. Crane, 4 McLean, 317, Fed. Cas. No. 14,888; Whitehead v. State, 4 Humph. (Tenn.) 278. Plea of guilty by principal, withdrawal after accessaries' conviction, Groves v. State, 76 Ga. 808.

[19] Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754; Pettes v. Com., 126 Mass. 242; Hatchett v. Com., 75 Va. 925; Brown v. State, 18 Ohio St. 496, at page 508; Goins v. State, 46 Ohio St. 457, 21 N. E. 476; Buck v. Com., 107 Pa. 486; Ulmer v. State, 14 Ind. 52. The guilt of the principal, however, must be established. Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754; Hatchett v. Com., 75 Va. 925; Buck v. Com., 107 Pa. 486.

one of several principals named in the indictment has been convicted, but at common law he must be tried as accessary to that principal only.[20] An accessary cannot be convicted of a higher offense than the principal;[21] and, if the principal is acquitted, he cannot be convicted at all.[22] This, of course, applies equally to accessaries after the fact.

ACCESSARIES AFTER THE FACT.

49. An accessary after the fact is one who receives, relieves, comforts, or assists another, knowing that he has committed a felony.[1] Three things are necessary:

(a) The felony must have been completed.

(b) The person charged as accessary must have done some act to assist the felon personally.

(c) He must have known at the time he assisted the felon that he had committed a felony.

To make one an accessary after the fact, it will suffice if any assistance has been given in order to hinder the felon's apprehension or conviction. Thus, a person who, knowing that another has committed a felony, conceals him,[2] or furnishes him with a horse or money, or other means for flight, or, if he has been arrested, aids in his escape, is

[20] Starin v. People, 45 N. Y. 333; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; Stoops v. Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482.

[21] Buck v. Com., 107 Pa. 486. Contra, under statutes, Goins v. State, 46 Ohio St. 457, 21 N. E. 476; State v. Patterson, 52 Kan. 335, 34 Pac. 784.

[22] McCarty v. State, 44 Ind. 214, 15 Am. Rep. 232; Bowen v. State, 25 Fla. 645, 6 South. 459. Contra, State v. Bogue, 52 Kan. 79, 34 Pac. 410.

§ 49. [1] 4 Bl. Comm. 37; 1 Hale, P. C. 618; 2 Hawk. P. C. c. 29, § 26 et seq.

[2] Wren v. Com., 26 Grat. (Va.) 952.

an accessary after the fact.[3] Mere suffering a felon to escape, by taking no steps to detain him or to notify the authorities, does not make one an accessary; nor do acts of charity which merely relieve or comfort a felon, and do not hinder his apprehension and conviction or aid his escape.[4] It is essential that the assistance shall be rendered to the felon personally,[5] and there must in all cases be knowledge that the person has committed a felony. Mere suspicion is not enough.[6] Furthermore, the felony must be completed at the time the assistance is rendered. To render assistance to a person after he has struck a mortal blow, but before death has resulted therefrom, does not make one an accessary to the homicide, though it may make him an accessary to the assault with intent to kill.[7]

Persons in Family Relation.

A wife, being considered as under her husband's control, is not liable as an accessary for concealing or assist-

[3] Com. v. Filburn, 119 Mass. 297; Tully v. Com., 11 Bush (Ky.) 154. Fabricating testimony to procure acquittal, Blakely v. State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912. The false witnesses in such case are accomplices of person fabricating testimony. Id. One aiding to elude punishment, but not to elude capture, not an accomplice. People v. Dunn, 53 Hun, 381, 6 N. Y. Supp. 805. Failure to report murder does not render one an accomplice, where the failure was due to the principal's threats. Green v. State, 51 Ark. 189, 10 S. W. 266. In such case the danger must threaten life or limb, and must be present and immediate. Burns v. State, 89 Ga. 527, 15 S. E. 748.

[4] 4 Bl. Comm. 38; Wren v. Com., 26 Grat. (Va.) 952. But see White v. People, 81 Ill. 333.

[5] Loyd v. State, 42 Ga. 221 (receiving stolen goods does not make receiver accessary).

[6] Harrel v. State, 39 Miss. 702, 80 Am. Dec. 95; Wren v. Com., 26 Grat. (Va.) 952; State v. Empey, 79 Iowa, 460, 44 N. W. 707; Com. v. Filburn, 119 Mass. 297.

[7] Harrel v. State, 39 Miss. 702, 80 Am. Dec. 95.

ing him when he has committed a felony;[8] but a husband cannot assist his wife, nor a parent his child. No other relation than that of wife excuses.[9] To some slight extent there are statutory modifications of this rule.

Punishment and Procedure.

Under the common law, harsh as the rule may seem, an accessary after the fact is liable to the same punishment as the principal,[10] but this is almost universally changed by statutes prescribing a lighter punishment. Further than this, many acts of assistance which at common law would make one an accessary after the fact are by statute made substantive crimes, such as obstructing justice. An accessary after the fact must be indicted and prosecuted as such. He cannot at common law be convicted on an indictment charging him as principal,[11] though this is in many states changed by statute. Nor, at common law, can an accessary after the fact be punished before trial and conviction of the principal,[12] though this also is to a great extent changed by statute.

[8] State v. Kelly, 74 Iowa, 589, 38 N. W. 503.

[9] 4 Bl. Comm. 39.

[10] 4 Bl. Comm. 39.

[11] Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410; McCoy v. State, 52 Ga. 287; Hughes v. State, 12 Ala. 458; Wade v. State, 71 Ind. 535; State v. Dewer, 65 N. C. 572; People v. Gassaway, 28 Cal. 405. See, also, cases cited, ante, p. 111.

[12] McCarty v. State, 44 Ind. 214, 15 Am. Rep. 232; Com. v. Knapp, 10 Pick. (Mass.) 479, 20 Am. Dec. 534; Simmons v. State, 4 Ga. 465; Edwards v. State, 80 Ga. 127, 4 S. E. 268.

USE OF TERMS "AIDER AND ABETTOR" AND "ACCOMPLICE."

50. The term "aider and abettor" applies to principals in the second degree.

51. The term "accomplice" applies to all who take part in the commission of a crime, whether they are principals or accessaries.

The terms "aider and abettor" and "accomplice" are frequently used, and the student should understand their meaning. An abettor, as has been seen, may be either a principal in the second degree, where he is present when the crime is committed, or an accessary before the fact. An aider can only be a principal in the second degree or an accessary after the fact. An aider and abettor, therefore, is a principal in the second degree.[1] An accomplice is any one who is concerned with another in the commission of a crime. Each person concerned is the accomplice of the other, whether he be principal in the first or second degree, or accessary before or after the fact.[2] It has been held, however, in one case at least, that an accessary after the fact is not an accomplice.[3] When the proof against the accused is the testimony of an accomplice, it is usual for the court to advise the jury not to convict if the evidence is uncorroborated, although the jury may convict upon such evidence.[4]

§§ 50–51. [1] State v. Empey, 79 Iowa, 460, 44 N. W. 707; Tudor v. Com. (Ky.) 43 S. W. 187.

[2] Black, Law Dict. tit. "Accomplice;" Cross v. People, 47 Ill. 152, 95 Am. Dec. 474. In Texas, the statute makes "accomplice" synonymous with "accessary" only. Phillips v. State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

[3] State v. Umble, 115 Mo. 452, 22 S. W. 378.

[4] Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. v. Hayes, 140 Mass. 366, 5 N. E. 264; Ingalls v. State, 48 Wis. 647, 4 N. W. 785.

In some states it is provided by statute that there can be no conviction on the uncorroborated testimony of an accomplice.

PRINCIPAL'S LIABILITY FOR ACTS OF AGENT.

52. As a rule, no person is criminally liable for the act of another unless he has previously authorized or assented to it; and consequently a principal is not liable for the acts of his agents or servants which he did not authorize or assent to, because they are done in the course of the employment.

EXCEPTIONS—(a) In cases of libel and nuisance the principal is liable, under certain circumstances, for the acts of his agents or servants upon the ground of his negligence in failing to exercise proper control over them.

(b) Under some statutes the principal is liable for prohibited acts notwithstanding that they are done by his agents or servants without his authority or contrary to his instructions.

In General.

We have already seen that one who, by direct command or procurement, causes a criminal act to be committed by an innocent agent, is regarded as having himself committed it, and is liable as a principal in the first degree. We have also seen that, if the agent is himself guilty, the person procuring the act to be committed is, in case of felonies, a principal in the second degree, or an accessary before the fact, according as he is present or absent at the commission of the act,[1] and, in case of misdemeanors, a principal in either case.[2] We shall now see that a master or other principal is criminally liable in some cases for the acts and omissions of his servant or agent, though not expressly commanded by him.

§ 52. [1] See Bish. New Cr. Proc. § 1169. Ante, pp. 101, 109.
[2] Ante, p. 100.

As a rule, the principal or master is not criminally liable for the acts of his agent or servant if he has not previously authorized or assented to them.[3] The doctrine that ratification is equivalent to previous authority has no application.[4] Nor does the mere fact that the act was done by the servant or agent in the course of his employment, as in civil cases, render the employer responsible for it.[5] Criminal responsibility must rest, except in exceptional cases, upon the ground of assent, for otherwise the mental element necessary to make the act a crime is lacking. We have seen, however, that in some cases a man may be liable criminally for his negligence;[6] and upon this ground, in one or two exceptional cases, a man may be responsible for the acts of his servant or agent to which he has not assented. Moreover, it is in the power of the legislature to make a man criminally responsible for the acts of other persons whom he has failed to control.

Agent's Act as Evidence of Authority.

From the mere fact of employment to conduct a lawful business there can be no presumption that the person employed is authorized to do unlawful acts.[7] It has, however,

[3] Chisholm v. Doulton, 22 Q. B. Div. 736, 741. See cases generally cited under this discussion.

[4] Morse v. State, 6 Conn. 9. Cf. Reg. v. Woodward, 9 Cox, Cr. Cas. 95.

[5] Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Com. v. Briant, 142 Mass. 463, 8 N. E. 338, 56 Am. Rep. 707. Where the servant of a coal dealer, employed to deliver coal, for convenience in unloading, without the knowledge or authority of his employer, drove upon the sidewalk contrary to law, the employer was not liable. State v. Bacon, 40 Vt. 456.

[6] Ante, pp. 14, 55, 83; post, p. 207.

[7] Com. v. Briant, supra. State v. Mahoney, 23 Minn. 181; State v. Burke, 15 R. I. 324, 4 Atl. 761.

been frequently declared that under some circumstances the performance of an unlawful act by an agent in the course of his employment upon the employer's premises is enough to raise a presumption of fact that the act was authorized. Thus, where the defendant was indicted for publishing a libel (Junius' Letters) in a magazine which was bought at his shop, and professed to be printed by him, it was held that a sale by the defendant's servant in the shop was prima facie evidence of publication by the master, and that, although it might be contradicted by evidence to show that he was not privy to the publication, and did not assent to or encourage it, it was conclusive until contradicted.[8] So it has been held that a sale of spirituous liquors by a clerk in the absence of the principal, in violation of a statute forbidding sale without license, is prima facie evidence of a sale by the master.[9] It seems, however, that, while such evidence warrants an inference that the act was authorized, which would justify a jury in so finding, it is not correct to hold that this creates a presumption of fact that it was so.[10] That no such presumption is created by a single unlawful sale so made to an habitual drunkard or a minor has been frequently held.[11] Whatever the weight to be given to such evidence, unless it be made conclusive by statute, it may, of course,

[8] Rex v. Almon, 5 Burrows, 2686.

[9] Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; Barnes v. State, 19 Conn. 397; Anderson v. State, 22 Ohio St. 305; State v. McCance, 110 Mo. 398, 19 S. W. 648 (under statute providing that agent's sale shall be taken to be act of master); State v. Weber, 111 Mo. 204, 20 S. W. 33; Fullwood v. State, 67 Miss. 554, 7 South. 432.

[10] Com. v. Briant, supra; Com. v. Hayes, 145 Mass. 289, 14 N. E. 151; Com. v. Houle, 147 Mass. 380, 17 N. E. 896; Com. v. Perry, 148 Mass. 160, 19 N. E. 212; Com. v. Hurley, 160 Mass. 10, 35 N. E. 89; Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475.

[11] State v. Mahoney, 23 Minn. 181.

always be shown that the act was in fact unauthorized, as by the proof of previous general instructions to the contrary;[12] although evidence of such instructions would be immaterial if it appeared that they were merely colorable, or that the act in question was done with the knowledge or approval of the principal.[13]

Negligence.

In certain cases, in exception to the general rule, the principal is held criminally liable for the acts of his agent, upon the ground of negligence. Thus, in cases of libel an exceptional responsibility has been held to rest upon booksellers and publishers respecting publications issued from their establishments in the regular course of business; and they have been held criminally liable in such cases, although the particular acts of sale or publication were done without their knowledge. In England, evidence of such a sale or publication was by the early decisions held to be only prima facie evidence of authority;[14] but in later cases it was held conclusive, upon the ground that it was necessary to prevent the escape of the real offender behind an irresponsible party.[15] In this country the liability of the principal in such cases has been placed on the ground of negligence, or of culpable neglect to exercise proper care and supervision over subordinates in the principal's employ. It is therefore competent in defense to show that the unlawful publication was made under such circumstances as to negative any pre-

[12] Com. v. Wachendorf, 141 Mass. 270, 4 N. E. 815; Com. v. Joslin, 158 Mass. 482, 33 N. E. 653, 21 L. R. A. 449.

[13] State v. Mueller, 38 Minn. 497, 38 N. W. 691.

[14] Rex v. Almon, 5 Burrows, 2686.

[15] Rex v. Gutch, Moody & M. 433; Rex v. Walter, 3 Esp. 21. By statute the accused may show that the publication was made without his authority, and was not due to want of due care or caution. 6 & 7 Vict. c. 96.

sumption of privity, connivance or want of ordinary care, as by showing that the principal was absent, or confined by sickness, and unable to exercise proper care and supervision.[16]

So, in cases of nuisance, a large responsibility has been recognized. Thus it has been held that the directors of a company are liable for a common nuisance consisting in polluting the waters of a river, although they were ignorant of what had been done, on the ground that they were answerable for what had been done by their servants, to whom they had given authority to conduct their works.[17] Such a case may, perhaps, rest on the ground that the principal is responsible for the reasonable and natural consequences of acts which he had commanded. In a later case it was held that the owner of a quarry was liable for a nuisance consisting in obstructing a public river by casting into it stone and rubbish, although the acts were committed by his workmen without his knowledge and against his general orders, and, by reason of his age, he was unable to exercise supervision. The departure from the general rule was explained on the ground that the proceeding, although in form criminal, was in its nature civil.[18]

Statutory Offenses.

As we have seen, many statutes impose punishment irrespective of any intent to violate them, and notwithstanding

[16] Com. v. Morgan, 107 Mass. 199.

[17] Rex v. Medley, 6 Car. & P. 292. In Rex v. Dixon, 3 Maule & S. 11, a conviction for selling unwholesome bread on proof that the foreman by mistake had put too much alum in it was sustained on the ground that, if a person employs a servant to use an ingredient the unrestricted use of which is noxious, and does not restrain him in its use, the employer is liable, if it be used in excess, for failure to apply proper caution against its misuse.

[18] Reg. v. Stephens, L. R. 1 Q. B. 702.

ignorance or mistake of fact which at common law would be an excuse.[19] There are statutes, most of them having for their object the regulation of the sale of intoxicating liquors, which prohibit the doing of certain acts by certain classes of persons or in certain places, and which either expressly or by implication provide that such persons or the proprietors of such places shall be responsible for such acts, although committed without their knowledge, or even contrary to their instructions, by their subordinates. Such are many statutes prohibiting the sale of intoxicating liquors without a license, or in violation of the conditions of the license, or prohibiting sales to minors or intoxicated persons, or prohibiting saloons to be kept open on Sunday or after a certain hour, or forbidding the windows of saloons to be curtained. Doubtless it requires a clear expression of intention on the part of the legislature to justify a construction of a statute as imposing punishment upon a person for an act done without his knowledge or contrary to his instructions, and, unless the intention appears, the ordinary rule that a man is not criminally responsible for acts which he has not authorized must prevail;[20] but, where the statute does so provide, it is valid.[21] There is much conflict, real or apparent, in the decisions, and different constructions have often been placed by different courts upon similar enact-

[19] Ante, p. 84.

[20] Com. v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 432. Com. v. Wachendorf, 141 Mass. 270, 4 N. E. 817.

[21] People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; People v. Blake, 52 Mich. 566, 18 N. W. 360; Noecker v. People, 91 Ill. 494; State v. Denoon, 31 W. Va. 122, 5 S. E. 315; George v. Gobey, 128 Mass. 289; Com. v. Kelley, 140 Mass. 441, 5 N. E. 834; Boatright v. State, 77 Ga. 717; Carroll v. State, 63 Md. 551, 3 Atl. 29; Mogler v. State, 47 Ark. 109, 14 S. W. 473; State v. Kittelle, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698 (Sale to minor).

ments. The question for determination in each case must be whether it was the intention to require persons of the designated class to see to it at their peril that the prohibited acts are not performed. Thus, under a statute requiring saloons to be closed on Sunday, and imposing punishment for violation of the requirement, it was held that the penalties of the statute were denounced against the person whose saloon is not kept closed, and that no other fact than that it was not kept closed was necessary to complete the offense. "The section," said Cooley, C. J., "makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon closed." [22] So, under a statute providing that no licensee of a saloon shall place or maintain, or permit to be placed or maintained, on the premises, any screen or curtain or other obstruction, it was held that a licensee was liable for a screen or curtain which a servant maintained in his absence and against his orders, on the ground that the statute by fair intendment made the licensee responsible for the condition of his premises, and liable whether the prohibited act was done by him personally or by his agent left in charge of the business.[23] On the other hand, where a saloon keeper was prosecuted under another section of the same statute, which provided that "no person shall sell or expose or keep for sale spirituous or intoxicating liquors except as authorized in this chapter," it was held that the defendant was not liable for a sale made without his knowledge between prohibited hours, it appearing that he had given strict orders that no such sale should be made, upon the ground that the section on which the complaint was based subjected to punishment "any per-

[22] State v. Roby, supra. Cf. People v. Parks, 49 Mich. 333, 13 N. W. 618, and People v. Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385, where the statutes involved were differently construed.

[23] Com. v. Kelley, supra.

son who sells liquor," and that it was unreasonable to construe it as subjecting to punishment a person who does not sell, because a servant in his employ, in opposition to his will and against his orders, makes an unlawful sale.[24]

AGENT'S LIABILITY FOR HIS OWN ACTS.

53. An agent, if of sufficient mental capacity, is criminally liable for his acts, though they are committed by command of his principal, and in the course of his principal's business.[1]

A servant or other agent, if he has the requisite knowledge and intent to render him liable for his acts, can never defend, when prosecuted for a criminal act, on the ground that he was commanded by his master to do the act, or that the act was in the course of his master's business. As we have already seen, no command will excuse an act,[2] except, in some cases, the command of a husband to his wife.[3] Thus, a barkeeper illegally selling liquor is equally liable with his employer.[4] Even a voluntary agent who

[24] Com. v. Wachendorf, 141 Mass. 270, 4 N. E. 817.

§ 53. [1] 1 Bl. Comm. 429, 430; 2 Dane, Abr. 316. Liable for nuisance, State v. Bell, 5 Port. (Ala.) 365; Allyn v. State, 21 Neb. 593, 33 N. W. 212. Keeping eating house without license, Winter v. State, 30 Ala. 22. Keeping house as liquor nuisance, liable where he has charge of business, Com. v. Merriam, 148 Mass. 425, 19 N. E. 405; Com. v. Kimball, 105 Mass. 465; but not where master is sole proprietor, and directly superintends the business, Com. v. Galligan, 144 Mass. 171, 10 N. E. 788, and cases there cited; State v. Gravelin, 16 R. I. 407, 16 Atl. 914 (cf. State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838). Keeping gaming house, Stevens v. People, 67 Ill. 587; Com. v. Drew, 3 Cush. (Mass.) 279.

[2] Ante, p. 92.

[3] Ante, p. 93.

[4] Com. v. Hadley, 11 Metc. (Mass.) 66; Com. v. Hoyer, 125 Mass. 209; Com. v. Brady, 147 Mass. 583, 18 N. E. 568; State v. Wiggin,

makes an unlawful sale of liquor, or assists in maintaining a liquor nuisance, and who receives no compensation for his work, is guilty.[5] If, however, a servant does not in fact know he is doing wrong, and is not charged by law with knowledge, as, for instance, where he takes another's property for his master, which he believes to be his, but which the master intends to steal, not having the particular intent necessary to constitute the crime, the servant is not criminally liable.[6]

20 N. H. 449; Schmidt v. State, 14 Mo. 137; Hays v. State, 13 Mo. 246; State v. Matthis, 1 Hill (S. C.) 37; State v. Wadsworth, 30 Conn. 55; French v. People, 3 Parker, Cr. R. (N. Y.) 114; Menken v. City of Atlanta, 78 Ga. 668, 2 S. E. 559; Davidson v. State, 27 Tex. App. 262, 11 S. W. 371; State v. Chastain, 19 Or. 176, 23 Pac. 963; Baird v. State, 52 Ark. 326, 12 S. W. 566; State v. Morton, 42 Mo. App. 64; Abel v. State, 90 Ala. 631, 8 South. 760.

[5] State v. Finan, 10 Iowa, 19; Com. v. Williams, 4 Allen (Mass.) 587; State v. Bugbee, 22 Vt. 32; Cagle v. State, 87 Ala. 38, 93, 6 South. 300; State v. Herselus, 86 Iowa, 214, 53 N. W. 105; Beck v. State, 69 Miss. 217, 13 South. 835.

[6] Reg. v. Bleasdale, 2 Car. & K. 765; State v. Matthews, 20 Mo. 55.

CHAPTER VII.

THE OVERT ACT—ATTEMPTS, SOLICITATIONS, AND CONSPIRACY.

NECESSITY FOR OVERT ACT.

54. The law does not punish mere intention, but requires some overt act in an attempt to carry that intention into execution.

EXCEPTION—There is an exception to this rule in the case of conspiracy, unless the conspiring may be regarded as an overt act, which is doubtful.

ATTEMPTS.

55. An attempt to commit a crime is an act done with intent to commit that crime, and tending to, but falling short of, its commission.

(a) The act must be such as would be proximately connected with the completed crime.

(b) There must be an apparent possibility to commit the crime in the manner proposed.

(c) There must be a specific intent to commit the particular crime at the time of the act.

(d) Voluntary abandonment of purpose after an act constituting an attempt is no defense.

(e) Consent to the attempt will be a defense if it would be a defense in case the crime were completed, but not otherwise.

56. All attempts to commit a crime, whether the crime be a felony or a misdemeanor, and whether it be such at common law or by statute, are misdemeanors at common law.[1]

EXCEPTIONS—(a) In some states, attempts are entirely regulated by statute.

(b) In most states, some attempts are felonies by statute.

While the law does not punish a mere intent to commit a crime, it does punish certain acts done in pursuance thereof, though they may not amount to the actual commission of the crime intended. There is a marked distinction between "attempt" and "intent." The former conveys the idea of physical effort to accomplish an act; the latter, the state of mind with which an act is done or contemplated.[2] It would be difficult to give a definition of "attempt" which should clearly draw the line between those acts done with intent to commit a crime and tending towards, but falling short of, its commission, which the criminal law notices, and those acts done with like intent which it deems too trivial, or not sufficiently proximate to the result intended, to notice.[3] To constitute an attempt there must be an act done in pursuance of the intent, and more or less directly tending to the commission of the crime. In general, the act must be inexplicable as a lawful act, and must be more than mere preparation. Yet it cannot accurately be said that no preparations can amount to an attempt. It is a question of degree, and depends upon the circumstances of each case.[4]

§§ 54–56. [1] Rex v. Roderick, 7 Car. & P. 795; Com. v. Barlow, 4 Mass. 439; Com. v. Kingsbury, 5 Mass. 106; Randolph v. Com., 6 Serg. & R. (Pa.) 398; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; State v. Jordan, 75 N. C. 27.

[2] State v. Martin, 14 N. C. 329; Lewis v. State, 35 Ala. 388.

[3] See Bish. New Cr. Law, § 728; Steph. Dig. Cr. Law, art. 49.

[4] "That an overt act, although coupled with an intent to commit a crime, commonly is not punishable if further acts are con-

Buying a gun for the purpose of killing another is a mere preparation, and is not an attempt to murder, but it would be different if the gun were pointed and the trigger pressed, and probably even if it were merely pointed with intent to shoot and kill, though even this is doubtful.[5] If one walks towards a house intending to commit a burglary, this is not

templated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus pœnitentiæ in the need of a further execution of the will to complete the crime. * * * The degree of proximity held sufficient may vary with circumstances." Per Holmes, C. J., in Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55. See, also, Com. v. Kennedy, 170 Mass. 18, 22, 48 N. E. 770. In Com. v. Peaslee, supra, it appeared that the defendant arranged combustibles in a building, on which he carried a large insurance, so that a candle might be placed in a can of turpentine, by which the building could be fired. He afterwards procured the candle, and offered to pay a servant if he would set the fire, which he refused to do. Later the defendant and the servant drove towards the building, but when within a quarter of a mile the defendant stated that he had changed his mind, and they returned. Without deciding the question whether there was an attempt, the court was of opinion that the evidence would warrant a conviction of an attempt to burn a building with intent to injure the insurers, under a statute punishing any one who attempts to commit a crime, "and in such attempt does any act towards the commission of such offense." It was held, however, that the indictment was insufficient for failure to allege an overt act proximately leading to the consummation of the crime.

[5] Proceeding to point a loaded gun, and exclaiming, "You are a dead man," was held not an attempt. Reg. v. Lewis, 9 Car. & P. 523. Putting finger on trigger of pistol at halfcock held not an attempt. Reg. v. St. George, Id. 483. In Florida, it seems to have been held that pointing a gun at a person is not an attempt to kill. Davis v. State, 25 Fla. 272, 5 South. 803.

an attempt;[6] but if he tries to open the door, and is unable to do so, it is otherwise. It is said that the act must be such as would be proximately connected with the crime if it were completed. Purchase of matches with intent to burn a straw stack is not an attempt, but it is otherwise if a fire is started, and afterwards blown out by the wind. Taking an impression of a particular lock, and having a key made, with intent to commit burglary, has been held a sufficient act to constitute an attempt;[7] but sending an order to a firm in San Francisco to ship whisky to a point in Alaska was held to be mere preparation, and not an attempt to introduce whisky into Alaska.[8] So, also, in case of preparation for an unlawful marriage it was held that there was not a sufficient overt act in sending for a magistrate to perform it and eloping.[9] Where a person set aside some of his master's property with intent to steal it, he was held

[6] 1 Whart. Cr. Law, § 181; dictum in Reg. v. Roberts, Dears. Cr. Cas. 539, and in Reg. v. Meredith, 8 Car. & P. 589. One cannot be convicted of attempt to enter and break a dwelling merely because he agrees with another to do so, meets him at the appointed time at a saloon with a revolver and slippers, to be used in the house, and goes into a drug store and buys chloroform to use, being arrested when he comes out. People v. Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108. The statute that any person who shall attempt to commit an offense, and do any act towards its commission, but shall fail or be prevented, is declaratory of the common law. People v. Youngs, supra; People v. Webb (Mich.) 86 N. W. 406. Cf. Com. v. Peaslee, supra.

[7] Griffin v. State, 26 Ga. 493.

[8] U. S. v. Stephens, 8 Sawy. 116, 12 Fed. 52. Starting to hunt prairie chickens with loaded gun is not an attempt to kill prairie chickens. Cornwell v. Association, 6 N. D. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. Rep. 601.

[9] People v. Murray, 14 Cal. 159. But see Reg. v. Chapman, 2 Car. & K. 846, where taking a false oath to procure a marriage license was held an attempt to marry without a license.

guilty of an attempt to steal, though the fraud was discovered before he had time to remove it.[10] We have already seen that having possession of dies with intent to counterfeit is not a crime at common law, as there is no overt act, but that it is different where dies are procured with intent to counterfeit, the procuring being an overt act.[11] The same rule applies where indecent prints are procured with intent to publish them.[12] It is not a crime at common law to have possession of forged instruments with intent to pass or utter them,[13] but this has to some extent been changed by statute.[14]

Inability to Commit the Crime—Absence of Essential Object or Inadequacy of Means.

A man may fail to commit the crime intended solely because the nonexistence of some essential object, or because the inadequacy of the means used, renders the crime impossible of completion; and under such circumstances he may in some cases be guilty of a criminal attempt, while in others he may not. The books are not clear as to the line between these cases. Though the contrary has been held in England,[15] it has been held in several of our states that

[10] Cheeseman's Case, Leigh & C. 140. Where a contractor, by false pretenses as to the amount of property delivered under the contract, obtained credit for the excess, and would have been paid therefor but for discovery of the fraud, he was held guilty of an attempt to obtain property by false pretenses. Reg. v. Eagleton, Dears. Cr. Cas. 515.

[11] Ante, p. 57, footnote 6.

[12] Dugdale v. Reg., 1 El. & Bl. 435; Reg. v. Dugdale, 1 Dears. Cr. Cas. 64; Reg. v. Fulton, Jebb, Cr. Cas. 48. And see Reg. v. McPherson, Dears. & B. Cr. Cas. 201.

[13] Com. v. Morse, 2 Mass. 138.

[14] State v. Vincent, 91 Mo. 662, 4 S. W. 430; State v. Allen, 116 Mo. 548, 22 S. W. 792.

[15] Reg. v. Collins, 9 Cox, Cr. Cas. 497.

an attempt to pick a pocket, or steal from the person or a money drawer, is a criminal attempt, though there may be nothing in the pocket or on the person or in the drawer,[16] and a later English case is to the same effect.[17] It has also been held a criminal attempt to kill where a man shot at a hole in the roof where he supposed a policeman was watching, though, when the shot was fired, the policeman had the good fortune to be at another point on the roof;[18] and even in England a conviction for an attempt to commit an abortion was sustained though the woman was not pregnant.[19] This is not altogether consistent with their refusal to convict for attempting to pick an empty pocket. In all of these cases it was absolutely impossible to commit the intended crime, but the accused did not know of the existence of the facts rendering it impossible. There was to him an apparent possibility, and most of the courts hold that this

[16] State v. Wilson, 30 Conn. 500; Com. v. McDonald, 5 Cush. (Mass.) 365; People v. Jones, 46 Mich. 441, 9 N. W. 486; Clark v. State, 86 Tenn. 511, 8 S. W. 145; Rogers v. Com., 5 Serg. & R. (Pa.) 462; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Beal, 37 Ohio St. 108, 41 Am. Rep. 490; People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732 (under Pen. Code, § 34, providing that an act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit the crime).

[17] Reg. v. Ring, 61 Law J. M. Cas. 116, 66 Law T. (N. S.) 300, following Reg. v. Brown, 24 Q. B. Div. 357, and overruling Reg. v. Collins, 9 Cox, Cr. Cas. 497.

[18] People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165.

[19] Reg. v. Goodchild, 2 Car. & K. 293, 2 Cox, Cr. Cas. 40. See, also, Com. v. Taylor, 132 Mass. 261; Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910. In Iowa it has been held a criminal attempt to commit abortion to administer a harmless drug, not knowing it to be harmless, with intent to procure an abortion. State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148.

is sufficient. In a Connecticut case it was said, in speaking of an attempt to pick an empty pocket, that "the perpetration of the crime was legally possible, the persons in a situation to do it, the intent clear, and the act adapted to the successful perpetration of it; and whether there was or not property in the pocket was an extrinsic fact, not essential to constitute the attempt." [20] It was said in a Massachusetts case that, "whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." [21]

Again, one may fail to accomplish his purpose because the means adopted are insufficient. He may fail in an intended murder because his gun is unloaded, or because his victim is too far off for the ball to reach him, or he may fail in an attempt to poison because what he supposes to be poison is in fact a harmless drug. Here the same principle has been applied. It has been held that, if the means are apparently adapted to accomplish the intended result, there is a criminal attempt, though the contrary has also been held, and there are cases which require the means to be really adapted.[22] The great weight of authority, however,

[20] State v. Wilson, 30 Conn. 500.

[21] Com. v. Jacobs, 9 Allen, 274.

[22] Firing at another with a gun not loaded, so as to hurt, not an attempt. Henry v. State, 18 Ohio, 32; State v. Swails, 8 Ind. 524, 65 Am. Dec. 772 (since overruled by Kunkle v. State, 32 Ind. 220). Attempt to cheat by forged draft, where the person to be cheated was not in existence, held not a criminal attempt. People v. Peabody, 25 Wend. (N. Y.) 472. It seems to have been held in

is in favor of the rule stated.[23] Of course, if the means are not only absolutely, but apparently, inadequate, it is different. To strike a man with a slight switch, or snap a toy gun at him, could not amount to an attempt to kill him. It is said by Mr. Bishop that "where the nonconsummation of the intended criminal result is caused by an obstruction in the way, or by the want of the thing to be operated upon, if such impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the punishable attempt is committed." [24] The statutes, in some states defining particular attempts, require that there shall be a present ability to accomplish the crime intended, and in such case, of course, actual ability to commit the crime is essential.

Same—Inability in Law to Commit the Crime.

If a person attempts to do something which, even if his purpose is accomplished, will not be a crime in law, he is

Florida that pointing a gun at another is not an attempt to kill, in the absence of proof that it was loaded. Davis v. State, 25 Fla. 272, 5 South. 803. See, also, on this point, Reg. v. Gamble, 10 Cox. Cr. Cas. 545; Tarver v. State, 43 Ala. 354; Allen v. State, 28 Ga. 395, 73 Am. Dec. 760; State v. Napper, 6 Nev. 113; Robinson v. State, 31 Tex. 170.

[23] Kunkle v. State, 32 Ind. 230. On charge of assault with intent to kill, where the gun was pointed, and the trigger pulled, it is no defense that the gun failed to go off, People v. Ryan, 55 Hun, 214, 8 N. Y. Supp. 241; or that there was no cap on it, Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691. Administering harmless drug with intent to kill, believing the substance to be poison, held an attempt to kill. State v. Glover. 27 S. C. 602, 4 S. E. 564. Putting poison in cup with intent to kill, though dose insufficient. Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770. Evidence that ergot was administered, and that it will, under some circumstances, produce an abortion, sustains conviction of attempt to commit abortion. Hunter v. State, 38 Tex. Cr. R. 61, 41 S. W. 602. See, also, post, p. 234, and cases cited.

[24] 1 Bish. New Cr. Law, § 752.

not guilty of a criminal intent, though he may think that he will commit a crime. Thus, if an assault should be made on a man or a dummy dressed as a woman, with intent to ravish, the assailant believing that the man or dummy is a woman, there is no attempt to rape, because in such a case the commission of the crime of rape would be a legal impossibility.[25] So, also, to shoot at a log or a shadow, believing it to be a man, would not be an attempt to murder;[26] but it would probably be otherwise if there were danger of injury, as, for instance, in shooting at the shadow of a man, where the man is himself so near as to be in danger, or in shooting into an empty coach, believing it to be occupied.[27] In New York, where the Code declares it extortion to obtain the property of another with his consent induced by a wrongful use of force or fear, it has lately been held that to attempt to obtain another's property by threats is not a criminal attempt where the person threatened is not influenced by the threats, but voluntarily gives up the property for the purpose of prosecuting the offender.[28] The ground of the decision was that, under the circumstances, it

[25] Dictum in People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072.

[26] Dictum in Reg. v. McPherson, Dears. & B. Cr. Cas. 201.

[27] 1 Whart. Cr. Law, § 186.

[28] People v. Gardner, 73 Hun, 66, 25 N. Y. Supp. 1072. O'Brien, J., dissented in this case, on the ground that it came within the principle laid down by the New York court of appeals in People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, where a conviction for attempting to pick an empty pocket was sustained. It is difficult to draw the line between the cases in which an attempt is rendered impossible of success because of the absence of some physical object which the person making the attempt believes to exist, in which case the attempt is held to be criminal, and those cases in which the attempt is held not to be criminal because the completed act would not in law constitute a

was legally impossible to commit the crime of extortion, because of the absence of force or fear. It has also been held that there can be no attempt to commit a crime by one who is in law incapable of committing it. A boy, if under the age of fourteen, is in some jurisdictions held incapable in law of committing rape,[29] and some courts have held that he cannot be guilty of an attempt to commit rape,[30] but if he is over that age, and apparently capable of the crime, he

crime. It is said that one who attempts to pick an empty pocket is guilty, because he does not know there is no money in it, and because, if there were money there, he would commit larceny. It might with equal reason be argued that one who attempts to ravish a dummy dressed as a woman does not know that it is not a woman, and would commit rape if it were a woman; and so, in the New York case mentioned, it might be argued that the defendant believed that the person he threatened gave up her property because of the threats, and that, if she did so, he would commit the crime of extortion. The true principle which should govern such cases is probably the one we have mentioned in the first chapter; namely, that the law does not punish trifling offenses. The attempt to pick an empty pocket is not a trifling offense, while the attempt to ravish a dummy is, for in the latter case there is no possibility of any injury whatever. See 1 Bish. New Cr. Law, § 723 et seq. Where an American, mistaking a party of American soldiers for British troops, went over to them, intending to adhere to them, this was held not to be a crime, as, under the circumstances, no crime could be committed. Respublica v. Malin, 1 Dall. (Pa.) 33, 1 L. Ed. 25. Attempt to commit subornation of perjury is not proved unless it appears that there was an attempt to procure false testimony in a matter material to the issue in some particular judicial proceeding. Nicholson v. State, 97 Ga. 672, 25 S. E. 360.

[29] Post, p. 223.

[30] 1 Whart. Cr. Law, § 184; Reg. v. Phillips, 8 Car. & P. 736; People v. Randolph, 2 Parker, Cr. R. (N. Y.) 213; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; State v. Handy, 4 Har. (Del.) 566. But see, contra, Com. v. Green, 2 Pick. (Mass.) 380.

may be convicted of an attempt, though he fails because of physical incapacity.[31]

The Intent.

The act must be done with the specific intent to commit a particular crime. This specific intent at the time the act is done is essential. To do an act from general malevolence is not an attempt to commit a crime, because there is no specific intent, though the act, according to its consequences, may amount to a substantive crime. To do an act with intent to commit one crime cannot be an attempt to commit another crime, though it might result in such other crime. To set fire to a house, and burn a human being who is in it, but not to the offender's knowledge, would be murder, though the intent was to burn the house only; but to attempt to set fire to the house under such circumstances would be an attempt to commit arson only, and not an attempt to murder. A man actuated by general malevolence may commit a murder, though there is no actual intention to kill; but, to be guilty of an attempt to murder, there must be a specific intent to kill.[32] To constitute the crime of rape, it is essential that the act shall be accomplished by force

[31] Impotency no defense unless defendant knew he was impotent. Territory v. Keyes, 5 Dak. 244, 38 N. W. 440.

[32] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Slatterly v. People, 58 N. Y. 354; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; State v. Stewart, 29 Mo. 419; Scott v. State, 49 Ark. 156, 4 S. W. 750; State v. Evans, 39 La. Ann. 912, 3 South. 63; Moore v. State, 26 Tex. App. 322, 9 S. W. 610; Carter v. State, 28 Tex. App. 355, 13 S. W. 147; Patterson v. State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152; People v. Mize, 80 Cal. 41, 22 Pac. 80; Walls v. State, 90 Ala. 618, 8 South. 680. The intent, however, may be inferred from the circumstances. Crosby v. People, 137 Ill. 325, 27 N. E. 49. Jackson v. State, 94 Ala. 85, 10 South. 509. To shoot at one person with intent to kill him is an attempt to kill another person who is struck by the ball. State v. Montgomery, 91 Mo. 52, 3 S. W. 379.

against the woman's will, and therefore, to constitute an attempt to rape, it is essential that there shall be an intent to use force, if necessary.[33] If one intends to do something which the law recognizes as a crime, he intends to commit that crime, and an act in pursuance of such intention would be an attempt to commit that particular crime, as he is presumed to know the law;[34] but, as we have already seen, if the law does not recognize the thing intended to be done as a crime, the fact that he thought it would be a crime does not render him guilty.[35] The intent to commit a crime must exist at the time the overt act is done. An intention formed subsequent to the act is not sufficient. As we have seen, it is an attempt to counterfeit for one to procure dies with intent to use them for counterfeiting; but, if one procures dies innocently, he will not be punished for an intent to counterfeit afterwards entertained, because there is no criminal intent when the overt act is committed, and there is no overt act when the intent is formed.[36] It is scarcely

[33] Lewis v. State, 35 Ala. 380; State v. Brooks, 76 N. C. 1; Johnson v. State, 63 Ga. 355; Taylor v. State, 50 Ga. 79; Johnson v. State, 63 Ga. 355; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; State v. Kendall, 73 Iowa, 255, 34 N. W. 843, 5 Am. St. Rep. 679; People v. Kirwan, 67 Hun, 652, 22 N. Y. Supp. 160; People v. Quin, 50 Barb. (N. Y.) 128; Peterson v. State, 14 Tex. App. 102; Brown v. State, 27 Tex. App. 330, 11 S. W. 412; Langan v. State, 27 Tex. App. 498, 11 S. W. 521; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Jones v. State, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850; Moore v. State, 79 Wis. 546, 48 N. W. 653; State v. Owsley, 102 Mo. 678, 15 S. W. 137; People v. Brown, 47 Cal. 447; People v. Fleming, 94 Cal. 308, 29 Pac. 647. There can be no attempt to rape by using cantharides, as that drug cannot have the effect of overcoming the woman's power of resistance. State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505. See, also, post, p. 232.

[34] See State v. Brooks, 76 N. C. 1.

[35] Rex v. Edwards, 6 Car. & P. 521.

[36] Ante, p. 57, footnote 6.

necessary to say that, since an intent is necessary to constitute an attempt, there can be no attempt at negligence, because a negligent act is necessarily done without intention.

Abandonment of Purpose.

When an act which amounts to an attempt has been once committed, it seems that no abandonment, even though voluntary, will relieve it of its criminality. Mr. Wharton, however, states the rule as follows: "If an attempt be voluntarily and freely abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a defense; but it is otherwise when the process of execution is in such a condition that it proceeds in its natural course, without the attemptor's agency, until it either succeeds or miscarries. In such a case no abandonment of the attempt, and no withdrawal from its superintendence, can screen the guilty party from the results." [37] Abandonment caused by fear of being detected, as where the person desists on seeing that he is watched, is not a defense.[38] Of course, if a person gives up his evil purpose before doing an act sufficient to constitute an attempt, he is not guilty, for there has been no attempt; [39] but, if he has committed a sufficient act, he has committed the crime of attempt, and he cannot purge himself by abandoning it.[40] To say otherwise would be to allow one to escape punishment by repenting after the crime has been committed.

[37] 1 Whart. Cr. Law, § 187.

[38] Reg. v. Taylor, 1 Fost. & F. 511.

[39] Pinkard v. State, 30 Ga. 757.

[40] Lewis v. State, 35 Ala. 380; State v. Elick, 52 N. C. 68; State v. McDaniel, 60 N. C. 245; Glover v. Com., 86 Va. 382, 10 S. E. 420; People v. Stewart, 97 Cal. 238, 32 Pac. 8; Young v. State, 82 Ga. 752, 9 S. E. 1108; Bishop v. State, 86 Ga. 329, 12 S. E. 641.

Effect of Consent.

We have already, in discussing the nature of crime, stated what effect consent of the person against whom a wrongful act is committed has in preventing the act from being a crime.[41] The question comes up in a new light in connection with attempts, and it will be well to consider it more particularly in that connection. We shall presently see that some crimes must, from their nature, be committed without consent, such, for instance, as larceny, robbery, and rape; and we have seen that a person may consent to an assault and battery which does not maim him or constitute a breach of the peace. In these cases, consent to the act prior to an attempt to commit it will prevent the attempt from being a crime.[42] If, however, an attempt to commit a crime is made without consent, subsequent consent to the completed act will not, as a rule, make the attempt any the less a crime. Thus, in case of attempt to rape, an indictment will lie for the attempt where it was at first resisted, though the woman afterwards ceased to resist, and consented to the act.[43] Consent, however, cannot be a defense on indictment for an attempt if it would not be a defense in case the intended crime were accomplishd. Carnal knowledge of a female under the age of consent is rape, notwithstanding her consent, and so an attempt to have carnal knowledge of her with her consent is an attempt to rape.[44]

[41] Ante, pp. 10–12.

[42] People v. Gardiner, 73 Hun, 66, 25 N. Y. Supp. 1072.

[43] State v. Hartigan, 32 Vt. 607; State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Bagan, 41 Minn. 285, 43 N. W. 5; Dickey v. McDonnell, 41 Ill. 62.

[44] State v. Harney, 101 Mo. 470, 14 S. W. 657; Davis v. State, 31 Neb. 247, 47 N. W. 854. Contra, Whitcher v. State, 2 Wash. St. 286, 26 Pac. 268.

SOLICITATION.

57. At common law it is a crime to solicit another to commit a felony, or [probably] any aggravated offense, although the person solicited refuses. Some courts have held the contrary.

It is an indictable offense at common law to solicit another to commit a felony.[1] Thus it has been held that it is a misdemeanor to solicit another to commit murder [2] or arson [3] or sodomy,[4] or to steal,[5] or to commit adultery where adultery was a felony,[6] but not where it was a misdemeanor only.[7] Whether solicitation to commit a misdemeanor is a crime is a question upon which there is some conflict. Thus it has been held a crime to solicit a public officer to take a bribe,[8] and for such a person to solicit a bribe,[9] to solicit a witness to be absent from a prosecution,[10] or to commit

§ 57. [1] Com. v. Flagg, 135 Mass. 545; Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782; State v. Davis, Tapp. (Ohio) 171. But see Whart. Cr. Law, § 179.

[2] Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782; Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653; Reg. v. Williams, 1 Car. & K. 589; Demarest v. Haring, 6 Cow. (N. Y.) 76, at page 88.

[3] Com. v. Flagg, supra; People v. Bush, 4 Hill (N. Y.) 133; State v. Bowers, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199, 28 Am. St. Rep. 847. But see, contra, McDade v. People, 29 Mich. 50. The statute has been amended in Michigan so as to make solicitation a crime. How. Ann. St. § 9128.

[4] Rex v. Hickman, 1 Moody, 34; Reg. v. Rowed, 6 Jur. 396.

[5] Rex v. Higgins, 2 East, 5; Reg. v. Daniel, 6 Mod. 99; Reg. v. Quail, 4 Fost. & F. 1076; Pennsylvania v. McGill, Add. (Pa.) 21.

[6] State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[7] Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686.

[8] Rex v. Vaughan, 4 Burrows, 2494; U. S. v. Worrall, 2 Dall. 384, Fed. Cas. No. 16,766.

[9] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569.

[10] State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

embracery.[11] On the other hand, it has been held not to be a crime to solicit to commit adultery where adultery was a misdemeanor.[12] The better rule appears to be that it is an offense to solicit another to commit a felony or any aggravated offense.[13] Solicitation to commit a crime is made a crime by statute in most states. Mr. Bishop classes solicitation as an attempt, regarding it as an overt act done towards the commission of the crime solicited, and there is some authority to this effect.[14] But it is generally held that the mere solicitation is not such an overt act as is essential to an attempt,[15] and that, if an indictment lies, it must charge the offense as solicitation.[16]

11 State v. Bonds, 2 Nev. 265.

12 Smith v. Com., supra. Explained on the ground that adultery was a mere misdemeanor in Com. v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782. Mere oral solicitation to sexual intercourse which would be incest is not indictable as solicitation at common law, for that punishes only solicitation to such crimes as break the peace or obstruct the course of justice; nor as an attempt, for want of an act. Cox v. People, 82 Ill. 191.

13 Com. v. Flagg, supra.

14 1 Bish. New Cr. Law, § 767 et seq.; People v. Bush, 4 Hill (N. Y.) 133. And see State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

15 State v. Harney, 101 Mo. 470, 14 S. W. 657; Hicks v. Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; State v. Butler, 8 Wash. 194, 35 Pac. 1093, 25 L. R. A. 434, 40 Am. St. Rep. 900.

16 State v. Bowers, supra; State v. Butler, supra; Stabler v. Com., 95 Pa. 318, 40 Am. Rep. 653, as explained in Com. v. Randolph, supra. Cf. Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55.

CONSPIRACY.

58. Conspiracy is a combination of two or more persons to do an unlawful act, whether that act be the final object of the combination, or only a means to the final end, and whether that act be a crime, or an act hurtful to the public, a class of persons, or an individual.[1] The offense is usually divided into three heads:

(a) Where the end to be attained is in itself a crime.

(b) Where the object is lawful, but the means by which it is to be attained are unlawful.

(c) Where the object is to do an injury to a third person, or a class, though, if the wrong were inflicted by a single individual, it would be a civil wrong, and not a crime.

59. The gist of the crime being the unlawful combination, no further overt act is necessary.

60. Conspiracies are misdemeanors, unless made felonies by statute.

It is essential to constitute the crime of conspiracy that there shall be an agreement to commit the unlawful acts; but it is not necessary that the agreement shall be a formal one. It is sufficient if the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement to do the act, though the agreement is not mani-

§§ 58–60. [1] Har. Cr. Law, 128; Reg. v. Parnell, 14 Cox, Cr. Cas. 508; State v. Mayberry, 48 Me. 218; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534 (containing an exhaustive review of the subject and the cases). See, also, Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346. In the noted Chicago Anarchist Case, it was held that an organization to propagate theories involving destruction of the present social system, and the common division of property and capital, is a criminal conspiracy if it advocates attainment of its ends by violent means, or if, in violation of the militia laws of the state, it provides for forming and drilling armed bodies of men for the purpose of carrying its plans into effect. Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

fested by any formal words.[2] There must, however, be some understanding between the parties; mere intention, or mere cognizance of another's intention to commit a crime, cannot make one his co-conspirator.[3] The gist of the crime being the combination, it follows that it cannot be committed by less than two persons;[4] and, as husband and wife are in law regarded as one person, it cannot be committed by them alone.[5] As soon as the unlawful combination or agreement is entered into, the crime of conspiracy is complete, and it is not necessary that there be any overt act in an attempt to carry out the agreement, the conspiring being regarded by some courts as an overt act sufficient to require the law's notice.[6] Under the statutes of some of the states, how-

[2] McKee v. State, 111 Ind. 378, 12 N. E. 510; Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96. A conspiracy to defraud by false pretenses is complete when formed, and it is immaterial that the person to be defrauded was not deceived, or that the pretenses were not calculated to deceive a person of ordinary intelligence. People v. Gilman, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218, 80 Am. St. Rep. 490.

[3] U. S. v. Lancaster (C. C.) 44 Fed. 896, 10 L. R. A. 333. And see ante, pp. 56, 103, 109.

[4] Com. v. Manson, 2 Ashm. (Pa.) 31.

[5] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; People v. Miller, 82 Cal. 107, 22 Pac. 934; State v. Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

[6] Rex v. Gill, 2 Barn. & Ald. 204; Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Hazen v. Com., 23 Pa. 355; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; State v. Younger, 12 N. C. 357, 17 Am. Dec. 571; Crump v. Com., 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Ochs v. People, 124 Ill. 399, 16 N. E. 662; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; State v. Noyes, 25 Vt. 415; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; People v. Arnold, 46 Mich. 268, 9 N. W. 406; State v. Pulle, 12 Minn. 164 (Gil. 99); U. S. v. Lancaster (C. C.) 44 Fed. 896, 10 L. R. A. 333.

ever, and under some of the federal statutes relating to conspiracies, an overt act is expressly required.

Character of the Acts Contemplated.

Where the object of the combination is to commit any crime, or where the object is lawful, but is to be attained by committing a crime, which is virtually the same thing, the conspiracy is always criminal. It will be noticed that, in the second division of the crime, it is stated that it is a criminal conspiracy to combine for the purpose of effecting a lawful object by unlawful means. Where the means to be used amount to a crime, as has just been stated, there is no difficulty in pronouncing the conspiracy criminal. The difficulty arises where the means amount merely to a civil wrong, and this applies equally to the third division of the crime. A combination of persons to commit a wrong, either as an end or as the means to an end, is so much more dangerous, because of the increased power to do the wrong, that the law, in some cases, regards it as criminal, whereas, if the wrong were attempted or even done by a single individual, the act would not be punished as a crime, but the injured person would be left to his civil action for redress. The injury to the public generally would be regarded as too trifling to be noticed. Most of the cases of conspiracy which arise are doubtless cases in which the acts contemplated are indictable either at common law, as in case of conspiracies to murder, to rob, or to cheat by false weights and measures, or under statutes, as in case of conspiracies to obtain property by false pretenses; but, according to the great weight of authority, acts need not necessarily be indictable at all, in order that a conspiracy to commit them may be criminal. It is sufficient if they are unlawful. There are a few cases which require the acts contemplated to be indictable,[7] but

[7] Rex v. Turner, 13 East, 228 (to commit civil trespass); Rex v. Pywell, 1 Starkie, 402 (to sell unsound horse with warranty of sound-

many of them have been overruled, and the great weight of authority is to the contrary. It has frequently been held a crime to conspire to defraud a person out of his property where the fraud amounted neither to a cheat at common law, nor to false pretenses under the statute.[8] It has also been held criminal to conspire to do many other acts not punishable as crimes; as, for instance, to seduce a female where seduction was not a crime;[9] to procure a fraudulent and sham marriage;[10] to effect the escape of a female infant for the purpose of marriage, against her father's will;[11] to procure a fraudulent divorce;[12] to induce a woman to prostitute herself;[13] to slander a person, or otherwise injure him

ness); Alderman v. People, 4 Mich. 414, 9 Am. Dec. 321; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Com. v. Prius, 9 Gray (Mass.) 127 (to cheat insurance company by procuring over-insurance); State v. Straw, 42 N. H. 393 (to commit civil trespass).

[8] Reg. v. Warburton, L. R. 1 Cr. Cas. 274; State v. Rowley, 12 Conn. 101; State v. Burnham, 15 N. H. 396; Com. v. Warren, 6 Mass. 74; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; State v. Mayberry, 48 Me. 218; dictum in State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649. To cheat one out of his land, People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; State v. Shooter, 8 Rich. Law (S. C.) 72. To make a person drunk, and cheat him at cards, State v. Younger, 12 N. C. 357, 17 Am. Dec. 571. To obtain property by false pretenses, Orr v. People, 63 Ill. App. 305. To defraud a county by false pretenses, People v. Butler, 111 Mich. 483, 69 N. W. 734.

[9] Rex v. Lord Grey, 9 How. St. Trials, 127; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Savoye, 48 Iowa, 562 (though in Iowa seduction was a crime by statute).

[10] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. And see State v. Savoye, 48 Iowa, 562.

[11] Mifflin v. Com., 5 Watts & S. (Pa.) 461, 40 Am. Dec. 527.

[12] Cole v. People, 84 Ill. 216 (under Illinois statute).

[13] Rex v. Delavel, 3 Burrows, 1432; Reg. v. Mears, 4 Cox, Cr. Cas. 423; Reg. v. Howell, 4 Fost. & F. 160.

in his character or business;[14] to charge a person with being the father of a bastard, in order to extort money;[15] to have a sane person declared insane.[16] A conspiracy to procure others to commit a crime is a crime.[17]

Same—Prejudice to Public Generally—Monopolies—Trade Unions.

It has also been held criminal to conspire to do acts which will prejudice the public or the government generally; as, for instance, to manufacture a spurious article to sell as genuine;[18] to obtain a monopoly, and raise the price of a commodity, so as to compel consumers to purchase at an exorbitant price;[19] or, under some circumstances, to raise

[14] State v. Hickling, 41 N. J. Law, 208, 32 Am. Rep. 198; Crump v. Com., 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; Com. v. Tibbetts, 2 Mass. 536. A combination of persons to injure another without just cause,—such as an injury that is not an incidental effect of legitimately promoting their business,—is a conspiracy to inflict malicious injury at common law. State v. Huegin (Wis.) 85 N. W. 1046.

[15] Reg. v. Best, 2 Ld. Raym. 1167, 1 Salk. 174. And see Johnson v. State, 26 N. J. Law, 312, but in the latter case the completed act would have been a crime, probably, and the conspiracy was indictable by statute. .However, see dictum. See, also, People v. Saunders, 25 Mich. 119.

[16] Com. v. Spink, 137 Pa. 255, 20 Atl. 680.

[17] Hazen v. Com., 23 Pa. 355.

[18] Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54. Combination by carriers to destroy competition, Sayre v. Association, 1 Duv. (Ky.) 143. Conspiracy to defraud bank of issue, and thereby depreciate the securities for the circulation held by the public, is indictable. State v. Norton, 23 N. J. Law, 33.

[19] Morris Run Coal Co. v. Coal Co., 68 Pa. 173, at page 187, 8 Am. Rep. 159. Combination of dealers to prevent competition in sale of coal held a conspiracy, without regard to what was done, and though the object was protection from ruinous rivalry, and no attempt was made to charge excessive prices. People v. Sheldon, 66

or lower wages. It is difficult to say to what extent it is criminal to combine for the purpose of raising wages. In England, it has been held indictable to make any combination for such a purpose, but it seems that the weight of authority both in England and in this country, and both under statutes and at common law, requires that some unlawful means shall be contemplated or used, such as a breach of contract of employment, or force, or intimidation; that wage earners may lawfully form a union, and agree among themselves not to work for anybody for less than a certain price, though there are cases to the contrary; but that they are criminally liable for conspiracy if they combine to break their contract with an employer, or to prevent other wage earners from entering his employ by intimidation or other unlawful means.[20] Under a statute making criminal conspiracies to commit acts injurious to trade or commerce, it was held indictable for journeymen workmen to combine for the purpose of compelling master workmen to obey the rules regulating the price of their labor, the court, in the

Hun, 590, 21 N. Y. Supp. 859; Id., 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690. Combination of sugar refineries to obtain monopoly, People v. Refining Co., 54 Hun, 354, 7 N. Y. Supp. 406. See, also, post, p. 151, footnotes 38–40.

[20] Reg. v. Brown, 12 Cox, Cr. Cas. 316; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649 (notifying employer that unless he discharges certain men they will, in a body, quit work); State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710 (publishing scab list); State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23 (boycott); Crump v. Com., 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895 (boycott). For a collection and review of the cases, see 28 Am. Dec. 507, and 59 Am. Dec. 720. Railway employés cannot combine to quit work to compel employer to withdraw from contractual relations with third person. U. S. v. Cassidy (D. C.) 67 Fed. 698. Conspiracy to drive mechanic out of employment because he would not join a union. State v. Dyer, 67 Vt. 690, 32 Atl. 814.

opinion, stating that a mechanic is not bound to work for any particular price, and may say that he will not make articles for less than a certain price, "but he has no right to say that no other mechanic shall make them for less. * * * If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object, are injurious, not only to the individuals particularly oppressed, but to the public at large." [21]

Same—Against Public Justice and Public Peace.

It is also criminal to conspire to pervert or prevent public justice; as, for instance, to falsely charge another with a crime, or otherwise procure criminal process against another for oppression or private ends; [22] to fabricate, destroy, or suppress evidence; [23] to resist or impede a sheriff or other officer in the performance of his legal duties; [24] to pack a jury, or otherwise tamper with jurors.[25] Bona fide combinations, however, to detect and prosecute criminals, are not unlawful. Conspiracies tending to a breach of the public peace are indictable.[26] Thus, it was held criminal to

[21] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

[22] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Com. v. Tibbetts, 2 Mass. 536; People v. Saunders, 25 Mich. 119; People v. Dyer, 79 Mich. 480, 44 N. W. 937.

[23] State v. De Witt, 2 Hill (S. C.) 282, 27 Am. Dec. 371; Com. v. Waterman, 122 Mass. 43 (to falsify marriage record); State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450 (to prevent attendance of witness duly summoned). But in Indiana, where all crimes must be defined by statute, conspiracy to commit perjury, to procure acquittal of person charged with crime, was held not to be indictable, State v. McKinstry, 50 Ind. 465.

[24] State v. McNally, 34 Me. 210, 56 Am. Dec. 650; State v. Noyes, 25 Vt. 415.

[25] O'Donnell v. People, 41 Ill. App. 23.

[26] Holtz v. State, 76 Wis. 99, 44 N. W. 1107; Seville v. State, 49

conspire to prevent the introduction of the English language into a church by violent means, though it would not have been unlawful simply to oppose its introduction.[27] It is not a crime, however, for persons who apprehend an immediate, violent, and criminal assault, and who are not themselves in fault, to combine for the purpose of resisting and defending themselves.[28] It would be a crime for a father to combine with others to get possession of his child by the use of violent means, constituting a breach of the peace; but it would be otherwise if the purpose were to get possession peaceably, and without the use of unlawful means.[29]

Liability of Conspirators.

One who conspires with others to commit an unlawful act is criminally liable for all the consequences that naturally flow from it, and is liable for the acts of each and all who participate with him in the execution of the unlawful purpose. Each conspirator is the agent of the other, and the acts done are therefore the acts of each and all.[30] There is no liability, however, for acts not contemplated, and which are not within the purpose of the conspiracy, or the natural

Ohio, 117, 30 N. E. 621, 15 L. R. A. 516. See, also, State v. McNally, 34 Me. 210, 56 Am. Dec. 650.

[27] Com. v. Eberle, 3 Serg. & R. (Pa.) 9.

[28] Goins v. State, 46 Ohio, 457, 21 N. E. 476.

[29] Com. v. Myers, 146 Pa. 24, 23 Atl. 164.

[30] 1 Hale, P. C. 441; 1 East, P. C. 257; Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; Spies v. People, 122 Ill. 1, 12 N. E. 865, and 17 N. E. 898; Williams v. State, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133; Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; Miller v. State, 25 Wis. 389; Kirby v. State, 23 Tex. App. 13, 5 S. W. 165; Lusk v. State, 64 Miss. 845, 2 South. 256; Com. v. Smith, 151 Mass. 491, 24 N. E. 677; Baker v. State, 80 Wis. 416, 50 N. W. 518; Turner v. State, 97 Ala. 57, 12 South. 54; U. S. v. Sweeney (C. C.) 95 Fed. 434.

consequence of executing that purpose.[31] In discussing the law as to principals and accessaries, we have gone at some length into this question. What was said there is equally applicable here.[32] Conspirators need not all join in the agreement at the same time. Those who join in a conspiracy previously formed, and assist in its execution, become conspirators, and equally liable with the others.[33] A person does not have to remain in a conspiracy after he has joined. He may abandon the purpose, and thereby escape liability for subsequent acts of his co-conspirators;[34] but he cannot escape such liability unless he informs them of his purpose to abandon them.[35] It follows from what has already been said that acts and declarations of one conspirator in regard to the business of the conspiracy are evidence against the others, but this is a matter more properly to be treated of under the subject of evidence.[36]

Executed Conspiracy—Merger.

We have already seen that if the conspiracy is carried out, and the acts committed amount to a felony, the conspiracy, being a misdemeanor, is at common law merged in the fel-

[31] People v. Knapp, 26 Mich. 112; People v. Foley, 59 Mich. 553, 26 N. W. 699; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; Spencer v. State, 77 Ga. 155, 3 S. E. 661, 4 Am. St. Rep. 74; State v. Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

[32] See ante, pp. 105–108, 110, and cases cited.

[33] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; State v. Clark, 9 Houst. (Del.) 536, 33 Atl. 310.

[34] State v. Allen, 47 Conn. 121; Pinkard v. State, 30 Ga. 757. And see ante, p. 111.

[35] State v. Allen, 47 Conn. 121.

[36] See State v. Thaden, 43 Minn. 253, 45 N. W. 447; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; State v. Soper, 16 Me. 293, 33 Am. Dec. 665; Com. v. Tivnon, 8 Gray (Mass.) 375, 69 Am. Dec. 248.

ony, the felony, and not the conspiracy, being punishable; but that it is otherwise where the acts amount to a misdemeanor only.[37] This, as has also been stated, is to a great extent changed by statute.

Statutes.

The subject of conspiracy is now regulated to a great extent by statutes in the different states, though in most cases the statute merely declares what was already the common law. There is also an act of congress making it a crime for two or more persons to conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.[38] This act requires some overt act to be done to effect the object of the conspiracy.[39] There are also other acts of congress relating to conspiracy.[40]

[37] Ante, p. 43.

[38] Rev. St. U. S. § 5440. Construction of the act, frauds contemplated, U. S. v. Owen (D. C.) 32 Fed. 534; U. S. v. Carpenter, 6 Dak. 294, 50 N. W. 123. Person incapable of completed crime, conspiring with one who is capable, is liable, U. S. v. Stevens (D. C.) 44 Fed. 132. Conspiracy to fraudulently obtain pension, U. S. v. Adler (D. C.) 49 Fed. 736. Conspiracy between railway officers to deceive the post-office authorities by fraudulent increase of mail during time of weighing for purpose of contract to carry mails, U. S. v. Newton (D. C.) 48 Fed. 218; Id., 52 Fed. 275. Conspiracy to violate interstate commerce act, Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.) 54 Fed. 730, 19 L. R. A. 387; Waterhouse v. Comer (C. C.) 55 Fed. 149, 19 L. R. A. 403.

[39] U. S. v. Reichert (C. C.) 32 Fed. 142.

[40] Conspiracy to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, Rev. St. § 5508. Who are "citizens," Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 32 L. Ed. 766. What acts within the statute, U. S. v. Lancaster (C. C.) 44 Fed. 885, 896, 10 L. R. A. 333. It is the right of a citizen to inform a marshal of a violation of the internal reve-

nue laws; and a conspiracy to injure, oppress, threaten, or intimidate him in the exercise of this right, or because of having exercised it, is punishable under this section. In re Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080.

By an act of congress, every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade, or commerce among the several states, and the monopolizing of, or combination with another to monopolize, trade or commerce among the several states, is declared a misdemeanor. Act Cong. July 2, 1890 (26 Stat. 209). Combination to monopolize the coal market, U. S. v. Coke Co. (C. C.) 46 Fed. 432, 12 L. R. A. 753; or lumber market, U. S. v. Nelson (D. C.) 52 Fed. 646. There are also similar statutes in the different states. Whisky trust in violation of federal statute, U. S. v. Greenhut (D. C.) 50 Fed. 469; In re Greene (C. C.) 52 Fed. 104. Right of state corporations to acquire and control products thereof. In re Greene (C. C.) 52 Fed. 104. Meaning of "monopolize," Id. The act of congress of July 2, 1890, applies to combinations between carriers. U. S. v. Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Id., 7 C. C. A. 15, 58 Fed. 58, 24 L. R. A. 73. Combination between insurance companies to control and increase rates is an unlawful trust and combination, in restraint of trade and products. State v. Phipps, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152. A contract between manufacturers of iron pipe in different states, whereby free competition was restrained, and prices determined by a committee, held unlawful. U. S. v. Steel Co., 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; Addyson Pipe & Steel Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. A combination imposing restraint on interstate commerce is unlawful, whether reasonable or unreasonable, and whether or not it actually raises prices. U. S. v. Association (C. C.) 85 Fed. 252; U. S. v. Association, supra. The act of July 2, 1890, applies to combinations of laborers, as well as capitalists. U. S. v. Workingmen's Amalgamated Council (C. C.) 54 Fed. 994, 26 L. R. A. 158. As to combinations to obstruct mails and interstate commerce, In re Grand Jury (D. C.) 62 Fed. 840; U. S. v. Debs (C. C.) 64 Fed. 724; U. S. v. Cassidy (D. C.) 67 Fed. 698; U. S. v. Elliott (C. C.) 62 Fed. 801; Thomas v. Railroad Co. (C. C.) 62 Fed. 803.

CHAPTER VIII.

OFFENSES AGAINST THE PERSON.

HOMICIDE IN GENERAL.

61. Homicide is the killing of a human being by a human being,[1] and is either

(a) Justifiable,

(b) Excusable, or

(c) Felonious.

62. To constitute homicide,

(a) The killing must be of a human being.

(b) The blow or other act must naturally contribute to the death.

(c) It is immaterial that other causes contribute to the death.

(d) Death must follow the blow within a year and a day.

Subject of Homicide—Human Being.

Any living human being may be the subject of a felonious homicide, even though he may be under sentence of

§§ 61–62. [1] Stephen, Dig. Cr. Law, art. 218.

death, and awaiting execution.[2] The killing of an enemy in the heat of battle is not a felonious homicide, but even an enemy cannot be killed except in the exercise of war.[3] It is essential that the victim shall be a human being; that is, a person in being at the time of the killing. The killing of a child, therefore, in its mother's womb, is not a homicide,[4] though it is otherwise if the child is born alive, and dies of wounds or drugs received while in the womb, or dies because the drug causes it to be prematurely born.* The child must have been born alive, and have had a circulation independent of its mother.[5] Destruction of an unborn child is abortion and not homicide. In some states, however, by statute, it is made manslaughter to kill an unborn quick child or to cause its death by procuring abortion.

The Killing—Death Result of Act or Omission.

Any act which probably may, and eventually does, result in another's death, is sufficient to render the doer criminally liable. The form of death is immaterial. It is no defense to say that there was no actual intention to cause death, if the act was reasonably liable to have such a result. One may also be guilty of a homicide by reason of his omission to act, as where he neglects to provide for a child for whom it is his duty to provide, and by reason of such neglect the child dies. Of course, the act must have been the cause of the death, and the death must be the natural and probable

[2] 4 Bl. Comm. 178; 1 Hale, P. C. 497; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154; Evans v. People, 49 N. Y. 86.

[3] State v. Gut, 13 Minn. 341 (Gil. 315).

[4] Rex v. Brain, 6 Car. & P. 349.

* 3 Inst. 50; 1 Hale, P. C. 433; Reg. v. West, 2 Car. & K. 784.

[5] Rex v. Enoch, 5 Car. & P. 539; Reg. v. Trilloe, 1 Car. & M. 650; Reg. v. Sellis, 7 Car. & P. 850; State v. Winthrop, 43 Iowa, 519, 22 Am. Rep. 257; Wallace v. State, 10 Tex. App. 255.

consequence of the act or omission.[6] But it is immaterial whether the act or omission was the direct or the indirect cause; it is sufficient if it was a contributing cause. Mr. Bishop states the doctrine to be that, "whenever a blow is inflicted under circumstances to render the party inflicting it

[6] Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; People v. Rockwell, 39 Mich. 503 (post, p. 209). One who, in a quarrel, knocks his opponent down, whereupon a bystander kicks the latter, so as to cause death, is not guilty of such death jointly with the bystander, unless he had reason to expect or induced his interference. People v. Elder, 100 Mich. 515, 59 N. W. 237. Cf. People v. Carter, 96 Mich. 583, 56 N. W. 79. Where road trustees, charged with the duty of making contracts for repair of a road, neglected to do so, whereby the road got out of repair, and a traveler was killed, they were not guilty of manslaughter. Reg. v. Pocock, 5 Cox, Cr. Cas. 172. Imprisoning man where he may catch smallpox, if death results, may be murder. Castell v. Bambridge, 2 Strange, 854. So of procuring conviction and execution by false testimony,—doubtful. (See Steph. Dig. Cr. Law, art. 221.) Rex v. Macdaniel, Leach (4th Ed.) 44. Assaulting mother with nursing child, thereby causing her to scream, and bringing on convulsions, causing the child's death, may be manslaughter. Reg. v. Towers, 12 Cox, Cr. Cas. 530. Taking advantage of or creating a panic in a theater, thereby obstructing a passage, whereby persons are crushed and killed, may be manslaughter (semble). Reg. v. Martin, 14 Cox, Cr. Cas. 633. Cf. Reg. v. Halliday, 61 Law T. (N. S.) 701. Where, after a fight between defendant and his wife, she left the house, and he barred the door, and she was found dead the next morning in the snow, the court charged that, if defendant used such force and violence as to cause her to leave the house from fear of death or great bodily harm, and "from exposure to cold her death was produced by the said act," he was guilty of manslaughter. This was held erroneous, as authorizing conviction although her fear was not well-grounded or reasonable; and the jury should have been charged that, to convict, they must believe that death by freezing was the natural and probable consequence of leaving the house at the time and under the circumstances. Hendrickson v. Com., 85 Ky. 281, 3 S. W. 166, 7 Am. St. Rep. 596.

criminally responsible if death follows, he will be deemed guilty of the homicide, though the person beaten may have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed, either mediately or immediately, to the death, in a degree sufficient for the law's notice." [7] The fact that after the blow was given the person injured neglected or refused to take proper care of himself, or to submit to an operation by which he could have been cured, is no defense; nor is it a defense to show that the wound was improperly treated by the surgeon, and that, if it had been properly treated, the deceased might have recovered.[8] If, however, the wound was not mortal, and death resulted solely from improper treatment, the accused is not liable.[9] So, also, if a person has been mortally wounded by another, a third person who afterwards kills him by an independent act com-

[7] 2 Bish. New Cr. Law, § 637.

[8] 1 Hale, P. C. 428; Rex v. Rew, Kelyng, 26 (negligence in case of wound); Reg. v. Holland, 2 Moody & R. 351 (refusing to submit to treatment); Reg. v. Davis, 15 Cox, Cr. Cas. 174 (death caused by chloroform necessary to treatment); Com. v. Hackett, 2 Allen (Mass.) 136; Com. v. McPike, 3 Cush. (Mass.) 184, 50 Am. Dec. 727; State v. Bantley, 44 Conn. 537; People v. Cook, 39 Mich. 236, 33 Am. Rep. 380; Crum v. State, 64 Miss. 1, 1 South. 1, 60 Am. Rep. 44; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122 (lessening chances of recovery by use of intoxicants); State v. Smith, 73 Iowa, 32, 34 N. W. 597; State v. Landgraf, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; Bowles v. State, 58 Ala. 335; State v. Baker, 46 N. C. 267; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Sharp v. State, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27; Clark v. Com., 90 Va. 360, 18 S. E. 440 (unskillful treatment); Com. v. Eisenhower, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670. But see Coffman v. Com., 10 Bush (Ky.) 495.

[9] Crum v. State, 64 Miss. 1, 1 South. 1, 60 Am. Rep. 44; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Parsons v. State, 21 Ala. 300; Smith v. State, 50 Ark. 545, 8 S. W. 941.

mits a homicide, though he merely hastened a death which was bound to happen without his interference.[10] In such case the person who struck the first blow, though it would have resulted in death, is not liable for the homicide.[11] If a wound causes disease or necessitates amputation of a limb, and death results from the disease or amputation, the wound is the cause of death, in the eye of the law,[12] and the person who inflicted it must answer for the homicide; but it is otherwise if the disease is not connected with the wound in the relation of cause and effect.[13] It is immaterial that without the act or omission the death would have resulted from another cause; for example, that the person killed was diseased, or already wounded by another, and was likely, or even sure, to die when the blow was given.[14]

Time of Death.

The death must have resulted within a year and a day after the blow was given, or other act done which is alleged as the cause of death; otherwise, the law conclusively presumes that death resulted from some other cause.[15]

[10] Reg. v. Plummer, 1 Car. & K. 600; People v. Ah Fat, 48 Cal. 61.

[11] State v. Scates, 50 N. C. 420.

[12] Denman v. State, 15 Neb. 138, 17 N. W. 347; Powell v. State, 13 Tex. App. 244; Burnett v. State, 14 Lea (Tenn.) 439 (where death resulted from pneumonia, for jury whether assault contributed to pneumonia).

[13] Livingston v. Com., 14 Grat. (Va.) 592.

[14] 1 Hale, P. C. 428; Reg. v. Haines, 2 Car. & K. 368; Com. v. Fox, 7 Gray (Mass.) 585; People v. Ah Fat, 48 Cal. 61; State v. Costello, 62 Iowa, 404, 17 N. W. 605; State v. Smith, 73 Iowa, 32, 34 N. W. 597; State v. Morea, 2 Ala. 275; People v. Lanagan, 81 Cal. 142, 22 Pac. 482; Smith v. State, 50 Ark. 545, 8 S. W. 941; State v. O'Brien, 81 Iowa, 88, 46 N. W. 752. Although the first shot was in self-defense, if the second was not excusable, and contributed to or accelerated death, defendant was guilty of homicide. Rogers v. State, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154.

[15] State v. Orrell, 12 N. C. 139, 17 Am. Dec. 563.

Proof of Death.

The rule is that there can be no conviction of a felonious homicide on circumstantial evidence unless the body of the person alleged to have been killed has been found, or at least accounted for. It is not enough to merely show that it is missing,[16] but there must be direct proof of death. This requirement is satisfied if, for example, parts of the body are found, and marks and indications point to the identity of the deceased.[17] Even the confession of the accused made out of court is not alone sufficient,[18] but it is admissible, and may be sufficient if corroborated by the circumstances and the other evidence.[19]

DISTINCTION BETWEEN JUSTIFIABLE AND EXCUSABLE HOMICIDE.

63. A homicide is justifiable where the person committing it is not in fault, but kills in strict performance of a legal duty.

64. A homicide is excusable when the person committing it is to some degree in fault, but the circumstances are such that he does not deserve punishment.

None of the books are very clear as to the distinction between justifiable and excusable homicide. The difficulty

[16] 2 Hale, P. C. 290; Ruloff v. People, 18 N. Y. 179.

[17] Rex v. Clewes, 4 Car. & P. 221; People v. Beckwith, 108 N. Y. 67, 15 N. E. 53; People v. Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State v. Williams, 52 N. C. 446, 78 Am. Dec. 248; State v. Smith, 9 Wash. 341, 37 Pac. 491.

[18] State v. German, 54 Mo. 526, 14 Am. Rep. 481; People v. Lane, 49 Mich. 340, 13 N. W. 622; People v. Hennessey, 15 Wend. (N. Y.) 147; Stringfellow v. State, 26 Miss. 157, 59 Am. Dec. 247; State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404; State v. Laliyer, 4 Minn. 368 (Gil. 277).

[19] People v. Beckwith, 108 N. Y. 67, 15 N. E. 53; People v. Deacons, 109 N. Y. 374, 16 N. E. 676.

of drawing the line between them has generally been met by treating them together, but the common law makes a distinction. In some states statutes have been passed which virtually abolish the distinction as far as the particular state is concerned,[1] and in other states the courts have used the terms "justifiable" and "excusable" interchangeably; so that the modern cases are not always a safe guide. The distinction, however, is still recognized by the common law, and should be borne in mind in order to properly understand the common law of homicide. When the proper officer properly executes a criminal who is legally sentenced to death, he performs a legal duty, and is justified. No fault whatever attaches to him. If one man suddenly attacks another, who is not in fault, with the felonious intent to take his life, the person so assailed may kill him to prevent the felony. He not only has the legal right, but it is his duty, to kill him. There is no need for excuse, for the homicide is justifiable. If, on the other hand, two men suddenly become involved in mutual combat, without any intention on the part of either to kill the other, and, while so engaged, one of them attempts to take the other's life, and the latter kills him to prevent it, he is chargeable with some fault, because he need not have engaged in the affray; but if, after his life was threatened, he retreated as far as he could, and only killed his adversary when apparently necessary to save his life, the law excuses him, notwithstanding his original fault. A moment's thought will make it clear that the terms "justifiable" and "excusable" cannot be used as synonymous. A nonfelonious homicide must be either the one or the other; it cannot be both. No act that needs excuse is justifiable, and no justifiable act can need excuse. Formerly, excusable homicide was punished by forfeiture of

§§ 63–64. [1] Ramsey v. State, 92 Ga. 53, 17 S. E. 613.

goods, but it is no longer punishable at all. The exemption from responsibility is as entire as in case of justifiable homicide, and for this reason there is no practical importance in the distinction. This is no reason, however, why the distinction should not be understood.

JUSTIFIABLE HOMICIDE.

65. A homicide is justifiable,[1]

(a) Where the proper officer executes a person legally convicted of a crime and sentenced, in strict conformity with his sentence.

(b) Where an officer, or one acting in his aid, in the due execution of his office, kills one who is forcibly resisting his attempt to arrest, provided there is apparent necessity for the killing.

(c) Where a person lawfully imprisoned or under arrest, or another in his behalf, assaults the officer having him in charge, and the officer, to prevent the prisoner's escape, kills him or such other person, provided there is apparently no other way to prevent the escape or rescue.

EXCEPTIONS—In some jurisdictions it is held that an officer cannot kill a person, in custody for a misdemeanor, to prevent his escape.

(d) Where an officer or a private person, having legal authority to arrest for a felony, attempts to do so, and, on the flight of the person sought to be arrested, kills him in pursuit, provided, however, there is no other way in which the arrest can be made.

(e) Where an officer or private person, in endeavoring to disperse the mob in a riot, kills one or more of the parties, not being able otherwise to suppress the riot.

(f) When the homicide is necessarily committed in preventing one from committing a felony by force or surprise.

In all the cases above mentioned the killing is done in compliance with a legal duty, and is therefore said to be justifiable, rather than excusable, in that no fault whatever

§ 65. [1] Fost. Crown Law, 267.

attaches. If this legal duty is absent, there can be no justification, though, as will presently be seen, there may be an excuse.

Executing Criminals.

To justify execution of a criminal sentenced to death, the execution must be by the proper officer, the prisoner must have been legally convicted and sentenced by a competent court, and the sentence must be strictly carried out. If an officer who is not charged with the duty of executing a criminal under sentence of death were to execute the sentence, he would be guilty of murder; and, if the court which tries and convicts the prisoner and sentences him is without jurisdiction, both the judge and the officer executing the sentence will be guilty of murder. The sentence must be strictly executed. An officer would be guilty of a felonious homicide in beheading, shooting, or executing by electricity a criminal sentenced to be hung.[2]

Homicide in Making Arrest or Preventing Escape.[3]

If a legal arrest by an officer is forcibly resisted, he may oppose force to force, even though the death of the person resisting may be the consequence, but there must be a reasonable necessity for the killing.[4] He cannot kill if there is any other way of effecting the arrest. It is said that this ground of justification extends to both civil and criminal

[2] 4 Bl. Comm. 178, 179; 1 Hale, P. C. 433, 501; 1 Hawk. P. C. 70.

[3] Killing of prisoner by military guard to prevent escape, U. S. v. Clark (C. C.) 31 Fed. 710.

[4] 1 Hale, P. C. 494; 4 Bl. Comm. 179; 1 Russ. Crimes (9th Am. Ed.) 893; State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; State v. Anderson, 1 Hill (S. C.) 327; State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359; Clements v. State, 50 Ala. 117; North Carolina v. Gosnell (C. C.) 74 Fed. 734; Lynn v. People, 170 Ill. 527, 48 N. E. 964.

cases,[5] and it would at least seem that this should be so, for, if an officer would have to give up his purpose to arrest when confronted by superior physical force, he would in many cases be unable to arrest at all. There are cases, however, which hold that an officer is never justified in killing merely in order to effect an arrest for a misdemeanor;[6] and of course, under this ruling, he could not do so to effect an arrest in a civil action. If an officer's life is endangered, or if grievous bodily harm is imminent, his justification rests on a higher ground. We shall go into this more fully in the following pages.

After an arrest has once been made, and the offender is in custody, the officer having him in charge may kill him to prevent his escape, if such extreme measures are necessary; and he may, under like circumstances, kill others who are seeking to rescue the prisoner.[7] In those jurisdictions where it is held that an officer cannot kill to effect an arrest for a misdemeanor, it is also held that he cannot kill to prevent the escape of one in custody for a misdemeanor, as this is virtually a rearrest.[8] As already stated,

[5] See cases cited in preceding note. It applies to arrest for misdemeanor. State v. Garrett, 60 N. C. 144.

[6] Head v. Martin, 85 Ky. 480. 3 S. W. 622; Dilger v. Com., 88 Ky. 550, 11 S. W. 651; Smith v. State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

[7] Fost. Crown Law, 321; 1 Hale, P. C. 496; 2 East, P. C. 821; 4 Bl. Comm. 179; Jackson v. State, 76 Ga. 473. There must be necessity, and the officer is not the arbitrary judge as to whether it exists. State v. Bland, 97 N. C. 438, 2 S. E. 460.

[8] Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; Head v. Martin, 85 Ky. 480, 3 S. W. 622. Killing prisoner under arrest for misdemeanor, to prevent his escape, is justifiable, where attempt to escape is a felony by statute. State v. Turlington, 102 Mo. 642, 15 S. W. 141.

it is different even in those jurisdictions where the officer kills to prevent his own death or grievous bodily harm.

In civil cases and in cases of misdemeanor, where a person sought to be arrested does not assault the officer and forcibly resist the attempt to arrest, but flees, the officer cannot kill him in pursuit, but he must rather suffer him to escape.[9] It is otherwise in case of felonies. A fleeing felon may be killed if he cannot otherwise be taken.[10] In all of these cases it must be borne in mind that the killing must be apparently necessary.[11] Whenever an officer would be justified under the rules above stated, a private person having authority to arrest will be justified.

Suppression of Riot or Affray.

An officer is charged with the duty of suppressing riots and affrays. A private person has the right to suppress them, and is probably even bound to do so as well as the officer. In order to suppress a riot, life may be taken, if necessary, either by an officer or by a private person, but it must not be needlessly taken.[12] A person is not justified, however, in taking life to suppress an affray, as it cannot be necessary to go to such an extreme.[13] Of course, if a person's life is put in imminent danger while he is engaged

[9] Fost. Crown Law, 291; State v. Moore, 39 Conn. 244; Dilger v. Com., 88 Ky. 550, 11 S. W. 651.

[10] 1 East, P. C. 302; Rex v. Finnerty, 1 Craw. & D. 167; Jackson v. State, 66 Miss. 89, 5 South. 690, 14 Am. St. Rep. 542; State v. Roane, 13 N. C. 58.

[11] 4 Bl. Comm. 180; Rex v. Allen, 7 Car. & P. 153; Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; Clements v. State, 50 Ala. 117; Wright v. State, 44 Tex. 645.

[12] 1 Hale, P. C. 495; 4 Bl. Comm. 179; 2 Bish. Cr. Law, § 655; Pond v. People, 8 Mich. 150. But see Patten v. People, 18 Mich. 314, 100 Am. Dec. 173.

[13] People v. Cole, 4 Parker, Cr. R. (N. Y.) 35; Conner v. State, 4 Yerg. (Tenn.) 137, 26 Am. Dec. 217.

in an attempt to stop an affray, or grievous bodily harm is imminent, at the hands of the wrongdoers, he may kill to save himself; but his justification under these circumstances stands on a higher ground than the mere right to suppress an affray. He will be justified in taking life to save himself in such case, and not merely excused, for he is in no fault, but is performing a legal duty in interfering.

Homicide in Prevention of Felony.

It is not only every person's right, but it is his legal duty, to prevent a felony, even if he has to go to the extreme of taking the life of the person attempting to commit it.[14] If, therefore, life is necessarily taken in order to prevent a felony, the homicide is justifiable, not excusable merely.[15] The justification is not limited to the person upon whom the felony is attempted, but extends to every person who may be in a position to prevent it. To justify a homicide in prevention of a felony, the killing must be apparently necessary, as in the other cases of justifiable homicide.[16] Indeed, it is sometimes even said that it must be actually necessary, and that the felony must be in fact about to be committed.[17] If, at any rate, the belief that the felony is about to be committed is negligently adopted, the killing will be manslaugh-

[14] 1 East, P. C. 271; State v. Harris, 46 N. C. 190; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; State v. Rutherford, 8 N. C. 457, 9 Am. Dec. 658; State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; Staten v. State, 30 Miss. 619; People v. Payne, 8 Cal. 341; State v. Turlington, 102 Mo. 642, 15 S. W. 141.

[15] 1 Hale, P. C. 485, 486; 4 Bl. Comm. 180.

[16] Rex v. Scully, 1 Car. & P. 319; Ruloff v. People, 45 N. Y. 215; People v. Angeles, 61 Cal. 188. See, also, cases cited in following notes.

[17] Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; State v. Roane, 13 N. C. 58; Staten v. State, 30 Miss. 619; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645.

ter.[18] From the nature of things, it cannot be necessary to kill to prevent a felony unless the felony is attempted by force or surprise, as in case of a sudden and violent assault with intent to kill or to rape, or in case of burglary, robbery, or arson.[19] Larceny is a felony committed without force, generally by stealth, or at most by a mere trespass without violence, for a forcible attempt to steal would amount to an attempt to commit robbery, and an attempt at larceny is therefore no justification for killing the thief.[20] A woman is justified in killing a man who attempts to rape her, and a man is justified in killing one who is attempting to ravish his wife, daughter, or sister, or any other woman.[21] Here the felony is forcibly attempted. A husband or brother would not be justified in killing a man who is attempting to seduce and debauch his wife or sister by fraudulent means, and not by force.[22] If the felony can be otherwise prevented, a homicide is not justified. It is therefore a felonious homicide to kill one who is attempting a felony if there is an

[18] Levet's Case, 1 Hale, P. C. 474.

[19] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Pond v. People, 8 Mich. 150; Stoneham v. Com., 86 Va. 523, 10 S. E. 238; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242. "Treason, murder, burglary, rape, robbery, arson, piracy, or any other felony in which the traitor, felon, or pirate so acts as to give * * * reasonable ground to believe that he intends to accomplish his purpose by open force." Steph. Dig. Cr. Law, art. 199.

[20] Reg. v. Murphy, 2 Craw. & D. 59; State v. Vance, 17 Iowa, 138; Storey v. State, 71 Ala. 329.

[21] 4 Bl. Comm. 181; People v. Angeles, 61 Cal. 188.

[22] People v. Cook, 39 Mich. 236, 33 Am. Rep. 380. Not wholly justifiable or excusable, in the absence of statute, for a husband to kill his wife's paramour while in the act of adultery. Hooks v. State, 99 Ala. 166, 13 South. 767. See, also, post, p. 202, notes 26, 27. In Georgia, a husband or intended husband may kill to prevent the debauching of his wife or affianced wife. Futch v. State, 90 Ga. 472, 16 S. E. 102; Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630. But

opportunity to arrest him.[23] The killing must be in the prevention of a felony, and therefore killing in pursuit, without a warrant, of one who has abandoned his attempt to commit the felony, and fled, is not justifiable.[24] Nor is a person justified in killing one who is at the time in the act of committing a felony, if he does not know that he is so engaged, and does not kill him for that reason.[25]

Justifiable Defense of Life.

A woman who kills a man attempting to rape her may be said to kill him in self-defense, as well as for the purpose of preventing the felony; and there is no difference in principle between such a case and the case where a man, not himself in fault, kills one who is attempting to take his life. The killing in both cases is in self-defense, and is also to prevent a felony. Absence of any fault on the part of the person committing a homicide in self-defense distinguishes justifiable from excusable homicide. The distinction is of some importance in its bearing upon the duty of the person attacked. If the assault is with murderous intent, as where it is made with a deadly weapon, he is not bound to re-

there must be urgent danger. Jackson v. State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; Farmer v. State, 91 Ga. 720, 18 S. E. 987. But see Biggs v. State, supra. A father cannot kill to prevent fornication with, or seduction of, his daughter. Bone v. State, 86 Ga. 108, 12 S. E. 205. But see Varnell v. State, 26 Tex. App. 56, 9 S. W. 65. A son is not justified in killing a man because of adultery with his mother. State v. Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289.

[23] Rex v. Scully, 1 Car. & P. 319; State v. Roane, 13 N. C. 58.

[24] 1 Whart. Cr. Law, § 497; State v. Rutherford, 8 N. C. 457; Bowman v. State (Tex. Cr. App.) 21 S. W. 48. Contra, under Texas statute, in case of burglary and theft by night, under certain circumstances. Whitten v. State, 29 Tex. App. 504, 16 S. W. 296.

[25] Reg. v. Dadson, 4 Cox, Cr. Cas. 358; People v. Burt, 51 Mich. 200, 16 N. W. 378.

treat, but may stand his ground, and kill his assailant if necessary to save his life,[26] whereas if the assault is not made with a murderous intent, so as to constitute an attempt to commit a felony, this right to take life without first retreating does not exist.[27] The right of self-defense is not limited to defense of life. A person may kill another to prevent grievous bodily harm, such as mayhem or loss of limb.[28] In no case, however, can the plea of justifiable self-defense be sustained unless the killing was apparently necessary to save life or prevent grievous bodily harm.[29] If one is attacked with a deadly weapon, he may assume that the intention is to kill him, and may act on that assumption;[30] but he has no right to kill one who strikes him with his fist, or with an instrument not likely to cause grievous bodily

[26] 1 East, P. C. 271; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52; Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; State v. Thompson, 9 Iowa, 192, 74 Am. Dec. 342; State v. Kennedy, 20 Iowa, 569; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 416; State v. Tackett, 8 N. C. 210; State v. Kennedy, 91 N. C. 572; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Philips v. Com., 2 Duv. (Ky.) 328, 87 Am. Dec. 499; Marcum v. Com. (Ky.) 4 S. W. 786; Fields v. State, 134 Ind. 46, 32 N. E. 780; State v. Thompson, 45 La. Ann. 969, 13 South. 392; Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547.

[27] Reg. v. Hewlett, 1 Fost. & F. 91; State v. Thompson, 9 Iowa, 192, 74 Am. Dec. 342; and see cases cited, post, p. 182, footnotes 14–18.

[28] State v. Benham, 23 Iowa, 154, 92 Am. Dec. 416; State v. Burke, 30 Iowa, 331; State v. Sloan, 47 Mo. 604; People v. Campbell, 30 Cal. 312; Young v. State, 11 Humph. (Tenn.) 200. This will also appear from the cases cited in the other notes.

[29] May not take life to prevent unlawful arrest. Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193; State v. Cantiency, 34 Minn. 1, 24 N. W. 458.

[30] Kingen v. State, 45 Ind. 518; State v. Donnelly, 69 Iowa, 705, 27 N. W. 369, 58 Am. Rep. 234.

harm.[31] Nor is he justified in killing a person who has threatened him, and who he supposes intends to take his life, until some overt act is done by the latter evincing a purpose to immediately carry out such intention.[32] It is not meant by this that he must actually wait for the blow before acting in his defense,[33] nor even that his assailant must be within actual striking distance.[34] It is held by most of the courts that it is sufficient if the attack is apparently imminent, though some courts require actual danger. The rules as to imminence of danger will be discussed in treating of excusable homicide.[35] It is not necessary to repeat them here. The danger must in all cases be imminent, and the person resorting to the right of self-defense must be free from blame. One who seeks a person who intends to kill him, or otherwise brings the danger upon himself, cannot avail himself of the plea of self-defense;[36] but it is not to be inferred from this that he is bound to keep in hiding, or otherwise give up his freedom, in order to keep out of the

[31] Stewart v. State, 1 Ohio St. 66; Scales v. State, 96 Ala. 69, 11 South. 121; Smith v. State, 142 Ind. 288, 41 N. E. 595.

[32] 2 East. P. C. 271; Dyson v. State, 26 Miss. 362; People v. Lombard, 17 Cal. 316; People v. Scoggins, 37 Cal. 676; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; State v. Thompson, 83 Mo. 257; Stoneman v. Com., 25 Grat. (Va.) 887; Henderson v. State, 77 Ala. 77; Barnards v. State, 88 Tenn. 183, 12 S. W. 431, at page 443; State v. Jackson, 32 S. C. 27, 10 S. E. 769; State v. Jackson, 44 La. Ann. 160, 10 South. 600; State v. Howard, 35 S. C. 197, 14 S. E. 481; McDuffie v. State, 90 Ga. 786, 17 S. E. 105; Craig v. State (Tex. Cr. App.) 23 S. W. 1108.

[33] State v. McDonald, 67 Mo. 13; Bohannon v. Com., 8 Bush (Ky.) 481, 8 Am. Rep. 474.

[34] Fortenberry v. State, 55 Miss. 403.

[35] Post, p. 179.

[36] Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039.

other's way.[37] He simply must not seek the danger. If self-defense is required, and the person assailed is not in the wrong, the fact that he entertains malice and ill feeling towards his assailant is immaterial.[38] We have already stated that, if a murderous assault is made on a person, he is not bound to retreat, but may stand his ground. This is not the case where the assault is not murderous or with intent to kill. Here the person assaulted must do what he can, by retreat or otherwise, to avoid the necessity of taking life. He may resist the assault by opposing force to force,[39] but he cannot take his assailant's life until he has retreated "to the wall," or as far as his safety will allow.[40] In such case he is regarded as to some extent in fault. His duty and liability under such circumstances will be discussed in treating of excusable homicide. A person may resist an attempt to unlawfully arrest him, or to falsely imprison him, just as he may resist any other assault or trespass, by opposing force to force; but he cannot go to the extreme of taking life or using a deadly weapon, unless it becomes necessary

[37] Oder v. Com., 80 Ky. 32; Philips v. Com., 2 Duv. (Ky.) 328, 87 Am. Dec. 499; Bohannon v. Com., 8 Bush (Ky.) 481, 8 Am. Rep. 474; Com. v. Barnes (Ky.) 16 S. W. 457; People v. Gonzales, 71 Cal. 569, 12 Pac. 783; Smith v. State, 25 Fla. 517, 6 South. 482; People v. Lyons, 110 N. Y. 618, 17 N. E. 391. An instruction that defendant could not avail himself of the plea of self-defense if, apprehending danger from the conduct of the deceased when he drove by him, he returned by the same way, which was the proper and convenient road home, having armed himself in the meantime, is erroneous. Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. See, also, Allen v. U. S., 157 U. S. 675, 15 Sup. Ct. 720, 39 L. Ed. 854; State v. Evans, 124 Mo. 397, 28 S. W. 8.

[38] People v. Macard, 73 Mich. 15, 40 N. W. 784.

[39] Post, p. 240.

[40] Post, p. 182.

to save his life or prevent grievous bodily harm.[41] Mr. Bishop states that it would be otherwise where he would be taken beyond the reach of the laws.[42] We have in another connection considered the right of a person to take the life of an innocent third person to save his own.[43]

Defense of Habitation.

A man's house is his castle, and he is never bound to retreat from it. He may stand his ground there, and kill a person to prevent his forcible and unlawful entry.[44] He cannot, however, kill to prevent a trespass not accompanied by force.[45] Some of the courts hold that an assault on a man's dwelling house cannot be resisted to the extent of using deadly weapons unless the attack is made with intent to kill or inflict great bodily harm on the inmates, or unless there is reason to believe, and there is the belief,

[41] Creighton v. Com., 83 Ky. 142, 4 Am. St. Rep. 143, 84 Ky. 103, 4 Am. St. Rep. 193; State v. Row, 81 Iowa, 138, 46 N. W. 872; Palmer v. People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454. But see State v. Davis, 53 S. C. 150, 31 S. E. 62, 69 Am. St. Rep. 845.

[42] 1 Bish. New Cr. Law, § 868.

[43] Ante, p. 95.

[44] 1 Hale, P. C. 458; Wright v. Com., 85 Ky. 123, 2 S. W. 904; Pond v. People, 8 Mich. 150, at page 177; State v. Peacock, 40 Ohio St. 333; Corey v. People, 45 Barb. (N. Y.) 262; State v. Taylor, 82 N. C. 554; Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282; Baker v. Com., 93 Ky. 302, 19 S. W. 975. Necessity for killing, State v. Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106. Root house or outdoor cellar a part of dwelling, People v. Coughlin, 67 Mich. 466, 35 N. W. 72. Room used as store, where man slept under arrangement with tenant, not his dwelling. State v. Smith, 100 Iowa, 1, 69 N. W. 269. Guest may resist as if in his own house. Crawford v. State, 112 Ala. 1, 21 South. 214.

[45] Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282; Greschia v. People, 53 Ill. 295.

that the attack is made with such intent.[46] If the entry is sought to be made for the purpose of committing larceny or rape or any other felony, the attempt to enter is an attempt to commit burglary, which is a felony, and the killing may be justified on the ground of prevention of a felony, as well as defense of habitation.[47] But the attempt to enter is not felonious if there is no intent to commit a felony. One may, in attempting to forcibly enter another's house, be attempting the misdemeanor of forcibly entry, but his entry may nevertheless be resisted to the death. And, after a person has entered, an assault by him may be resisted to the death. There is no duty to retreat in order to avoid the necessity to kill.[48] Here, though, as well as in other

[46] State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200. Cf. State v. Countryman, 57 Kan. 815, 48 Pac. 137.

[47] People v. Lilly, 38 Mich. 270.

[48] Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; People v. Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151; State v. Middleham, 62 Iowa, 150, 17 N. W. 446; Brinkley v. State, 89 Ala. 34, 8 South. 22, 18 Am. St. Rep. 87; Bledsoe v. Com. (Ky.) 7 S. W. 884; Willis v. State, 43 Neb. 102, 61 N. W. 254; place of business is within the rule, Perry v. State, 94 Ala. 25, 10 South. 650; as is also a rented room occupied as a bedroom, Harris v. State, 96 Ala. 24, 11 South. 255. The rule does not apply outside the curtilage, Lee v. State, 92 Ala. 15, 9 South. 407, 25 Am. St. Rep. 17, nor to the yard when retreat into the house is possible, Watkins v. State, 89 Ala. 82, 8 South. 134; nor does the rule apply after retreating from house, Martin v. State, 90 Ala. 602, 8 South. 858, 24 Am. St. Rep. 844. Stable yard not within the rule, Perry v. State, 94 Ala. 25, 10 South. 650. Need not retreat when in "yard." Eversole v. Com., 95 Ky. 623, 26 S. W. 816; State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883. Person assailed need not retreat when on his own premises, near his dwelling house. Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086. Cf. Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547. One finding a man trying to obtain access to his wife's

cases, no unnecessary force can be used.[49] The life of the assailant cannot be taken except to save life or to avoid grievous bodily harm, or to prevent a felony. The same rules apply as in other cases, except that retreat is not necessary. Where a person has by force, actual or constructive, entered another's house, the latter may eject him, and may use all necessary force in doing so.[50] In such case, as the entry was by force, no request to leave is necessary before proceeding to expel the intruder. If, however, a person, either expressly or impliedly, permits another to enter his house, he cannot eject him without having previously requested him to leave, and can use no unnecessary force.[51]

Defense of Property.

A person may use all reasonable and necessary force, short of taking life, in defense of his property, real or personal, and to prevent another from dispossessing him of it; but he cannot under any circumstances be justified in killing merely to defend his property,[52] except, as we have seen, that he may kill to prevent a forcible entry into his house,

room in the night by opening a window may employ necessary force, and, if put in fear of life or great bodily harm, need not retreat, but may use necessary force to repel assault. Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051.

[49] State v. Middleham, 62 Iowa, 150, 17 N. W. 446; State v. Murphy, 61 Me. 56; Pond v. People, 8 Mich. 150. See, also, cases cited in preceding note.

[50] Cannot use unnecessary force; death caused by an unnecessary kick is manslaughter. Wild's Case, 2 Lewin, Cr. Cas. 214.

[51] State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Smith, 20 N. C. 117; Lyon v. State, 22 Ga. 399; Greschia v. People, 53 Ill. 295; State v. Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31.

[52] Reg. v. Archer, 1 Fost. & F. 351; U. S. v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714; State v. McDonald, 49 N. C. 19; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; State v. Gilman, 69

though, because of the absence of intent to commit a felony therein, he would not be justified on the ground of preventing a felony. In some cases it may, at first thought, seem that the killing is justifiable in defense of property, but a careful consideration will show that in all cases, except in defense of habitation, prevention of a felony by force or surprise is the real justification. If a man attacks me, and tries to take my property by force, he attempts a robbery, and I may kill him to prevent the felony. The justification does not rest on my right to defend my property. If a man attempts to set fire to my dwelling house by surprise, and I can only prevent it by killing him, I may do so; but the reason is because I may and must prevent the felony, and not because, if I do not kill him, I will lose my property. If the house were uninhabited, and therefore not the subject of arson, I would have no right to kill him, though my loss of property would be as great. If an assault is made on a person without felonious intent, he may resist the attack, and return blow for blow; and if, during the difficulty, his life is sought to be taken, or grievous bodily harm is sought to be inflicted, he may kill his adversary to prevent it. In such case, as he is engaged in mutual combat, which he could have avoided, he is in some degree in fault, in the eye of the law, and is merely excused, not justified. This consideration subjects him to the rules of excusable homicide. The same principle applies to defense of property. A person may resist a trespass on his property, real or personal,

Me. 169, 31 Am. Rep. 257; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; State v. Vance, 17 Iowa, 138; State v. Kennedy, 20 Iowa, 569; Kunkle v. State, 32 Ind. 220; Combs v. State (Ky.) 9 S. W. 655; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; Davison v. People, 90 Ill. 221; State v. Donyes, 14 Mont. 70, 35 Pac. 455; Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039 (repelling trespass on land).

not amounting to a felony, or a removal or destruction of his property not feloniously attempted, by the use of any reasonable or necessary force, short of taking or endangering life; but if he is unable to prevent it, and there is no felony attempted, he must suffer the trespass and the loss of the property, and seek redress at the hand of the law, rather than commit a homicide.[53] If, in the course of the struggle, the trespasser seeks to take the owner's life, the latter will be excused if he kills him.[54] He will not be justified, but merely excused, and the rules of excusable homicide requiring retreat will apply.

Same—Setting Spring Guns.

Since a person is justified in killing one who is attempting to commit a felony by force or surprise if it is necessary in order to prevent the felony, he may set spring guns to prevent felonies. Thus, he may set a spring gun in his dwelling so that it will kill a burglar if he attempts to enter, and he may also take such steps to protect his shop or warehouse where breaking into a shop or warehouse is made a felony by statute. A person cannot, however, set spring guns on his premises outside of his dwelling so as to kill persons who may merely trespass, as he would have no right to resist a mere trespass to the death. He can only set spring guns so that they will kill where he would have a right to kill.[55] In any event, he must not place

[53] Kendall v. Com. (Ky.) 19 S. W. 173; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; State v. Smith, 12 Mont. 378, 30 Pac. 679; Powers v. People, 42 Ill. App. 427.

[54] White v. Territory, 3 Wash. T. 397, 19 Pac. 37.

[55] 1 Bish. New Cr. Law, §§ 854-857; Gray v. Combs, 7 J. J. Marsh. (Ky.) 478, 23 Am. Dec. 431; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159. In Alabama, it is held that spring guns cannot be placed on property not a dwelling house. Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1.

them where they will endanger the lives of persons passing along the public street or road adjoining the premises.[56]

Defense of Others.[57]

We have seen that the right and duty to prevent a felony are not limited to the person upon whom it is attempted, but extend to every person who is in a position to prevent it. The principle of justification is broader than the mere idea of self-defense.[58] The right of third persons to interfere is not, however, limited to cases of attempted felony. Bystanders may interfere to prevent an assault or a larceny, or any other crime. The members of a family may protect and defend each other,[59] and a man's guests or neighbors may interfere to resist an attack on his house.[60] The rule is that one may do for another whatever another may do for himself,[61] though there are cases casting some doubt on the rule so broadly stated. The right to defend another can be no greater than the latter's right to defend himself.[62]

[56] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[57] Defense of justice of the United States supreme court by a United States marshal, In re Neagle (C. C.) 39 Fed. 833, 5 L. R. A. 78; Id., 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

[58] Rescue of friend from kidnappers. Com. v. Delaney (Ky.) 29 S. W. 616.

[59] 4 Bl. Comm. 186; Rex v. Harrington, 10 Cox, Cr. Cas. 370; Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; Crowder v. State, 8 Lea (Tenn.) 669; Pond v. People, 8 Mich. 150; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Sharp v. State, 19 Ohio, 379; Com. v. Malone, 114 Mass. 295; State v. Bullock, 91 N. C. 614; Smurr v. State, 105 Ind. 125, 4 N. E. 445; State v. Westfall, 49 Iowa, 328; State v. Brittain, 89 N. C. 481; Staten v. State, 30 Miss. 619; Saylor v. Com., 97 Ky. 184, 30 S. W. 390 (attempt by force and threats to abduct wife).

[60] Cooper's Case, Cro. Car. 544; Semayne's Case, 5 Coke, 91; Pond v. People, 8 Mich. 150.

[61] 1 Bish. New Cr. Law, § 877. Stanley v. Com., 86 Ky. 440, 6 S. W. 155, 19 Am. St. Rep. 305.

[62] Post, p. 185.

EXCUSABLE HOMICIDE IN GENERAL.

66. Excusable homicide may be either:
(a) Accidental, or
(b) In self-defense, on a sudden affray.

ACCIDENT.

67. Excusable homicide by accident is where the killing is the result of an accident or misfortune in doing a lawful act in a lawful manner.[1]

To excuse a homicide on the ground of accident, the accused must have been engaged in a lawful act, and he must have been performing it with due care.[2] If he was engaged in an unlawful act, or if the accident was the result of culpable negligence, he is criminally liable for the consequences.[3] It is a lawful act for a parent to chastise his child, and he is not liable if death results to the child where the punishment was moderate. If, however, he uses an instrument likely to cause serious injury, or inflicts punishment to an immoderate extent, he is criminally liable.[4] If a workman on a building throws material therefrom, and it kills a passer-by, the homicide is excusable if persons were not in the habit of passing, and there was no reason to suppose that they would pass. It would be otherwise, though, if he

§§ 66–67. [1] 4 Bl. Comm. 182.

[2] State v. Benham, 23 Iowa, 154, 92 Am. Dec. 416; People v. Lyons, 110 N. Y. 618, 17 N. E. 391. The killing of a person by the accidental discharge of a pistol by one engaged in no unlawful act, and without negligence, is homicide by misadventure. U. S. v. Meagher (C. C.) 37 Fed. 875.

[3] Post, p. 204 et seq.

[4] Fost. Crown Law, 262; 4 Bl. Comm. 182; 1 Hale, P. C. 473, 474; Reg. v. Griffin, 11 Cox, Cr. Cas. 402. Post, p. 206, footnotes 10, 11; page 239.

knew that people were passing, or it was likely that they were passing.[5] So also, if a person accidentally kills another in mutual combat, where he is voluntarily fighting, he is guilty of manslaughter, as the fighting is an unlawful act; but if he does not wish to fight, and is merely defending himself, as the law permits him to do, he is excused, on the ground of accident.[6] And if two persons engage in a friendly wrestling match, without unlawful violence, and one is thrown, and chances to fall in such a way that he is killed, or in such a way as to knock down a bystander, who is killed, the killing, being accidental, is excusable.[7] If a man shoots at a person, and accidentally kills a bystander, he will be in the same position as if he had killed the person intended. The killing will be murder, manslaughter, justifiable, or excusable, according as it would have been one or the other if the person intended had been killed.[8] It has been said that, to render one liable for an accident in the doing of an unlawful act, the act must be malum in se, and not merely malum prohibitum, and that, therefore, a person is not criminally liable for running over a person while driving at a speed prohibited by a city ordinance, but not recklessly, since the excessive speed is only wrong because of the ordinance.[9]

[5] Post, p. 207.

[6] Reg. v. Knock, 14 Cox, Cr. Cas. 1.

[7] Reg. v. Bruce, 2 Cox, Cr. Cas. 262.

[8] Agnes Gore's Case, 9 Coke, 81; Saunders' Case, 2 Plowd. 473; Plummer v. State, 4 Tex. App. 310, 30 Am. Rep. 165; Pinder v. State, 27 Fla. 370, 8 South. 837, 26 Am. St. Rep. 75. See, also, post, pp. 187, 191, note 14; page 237, note 58.

[9] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362. Post, p. 205.

EXCUSABLE SELF-DEFENSE.

68. Excusable homicide in self-defense is where a person from necessity kills another upon a sudden affray, to save his own life, or the lives of those whom he is bound to protect, or to prevent grievous bodily harm to himself or to them.[1]

(a) The danger must reasonably appear to be imminent.

(b) The person taking life must believe the danger to be imminent.

(c) He must have retreated as far as safety would allow, except that

EXCEPTION—A man is not bound to retreat when attacked in his own habitation.

(d) He must not have been the aggressor, and provoked the difficulty himself, except that

EXCEPTIONS—(1) A few courts seem to hold that this does not apply unless he had a felonious intent.

(2) His acts must have been calculated and intended to provoke a difficulty.

(3) If, after provoking the difficulty, he withdraws in good faith, and his adversary follows, he is no longer the aggressor, and may defend himself.

In explaining justifiable homicide, we have already shown the difference between justifiable and excusable self-defense. We saw that in justifiable self-defense no fault whatever attaches to the person committing the homicide; as, for instance, where the killing is of one who is making a murderous assault, or attempting any other forcible felony. Excusable homicide in self-defense is where the person committing it is regarded by the law as being to some extent to blame; as, for instance, where he resists an attack on his person or property not made with felonious intent, so as to give him the right to take his assailant's life, and thereby becomes involved in a combat or sudden affray. Where, after the difficulty has begun, the other party attempts to

§ 68. [1] 4 Bl. Comm. 183.

take his life, or inflict grievous bodily harm, he will be excused if he kills him to save himself. He is regarded as having been to some extent in fault in resisting the non-felonious attack, instead of seeking redress and protection at the hand of the law, and is therefore merely excusable, instead of being regarded as justified. Where an assault is not made in such a way as to threaten death or grievous bodily harm, or where a mere trespass upon property is attempted, or an unlawful arrest sought to be made, the person whose rights are thus assailed may repel force by force; but, as we have seen, he cannot go to the extreme of taking the aggressor's life, or using a deadly instrument in his defense, unless his life is in imminent danger at the hands of the aggressor, or unless grievous bodily harm is imminent. If his life or grievous bodily harm is threatened, and he can apparently prevent it only by taking his assailant's life, he will be excused for the homicide.[2] No other danger than of death or grievous bodily harm will excuse him. In the absence of a statute, a man is not even excused where he kills another while the latter is in the act of adultery with his wife.[3]

Imminence of Danger and Necessity.

Before self-defense can be available as an excuse, it must appear that the danger was imminent, and that the only apparently possible way in which to escape death or grievous bodily harm was to kill the assailant.[4] The danger must

[2] Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; White v. Territory, 3 Wash. T. 397, 19 Pac. 37.

[3] Hooks v. State, 99 Ala. 166, 13 South. 767. See ante, p. 165 note 22; post, p. 202.

[4] State v. Decklotts, 19 Iowa, 447; Meurer v. State, 129 Ind. 587, 29 N. E. 392; Greschia v. People, 53 Ill. 295. Cannot infer danger from ill will of adversary in prior contests, State v. Sullivan, 51 Iowa, 142, 50 N. W. 572.

be imminent, impending, and present, and not prospective, or even in the near future.[5] Some of the courts seem to hold that the danger must be real and actual, but it is doubtless mere careless use of words. The authorities are overwhelmingly to the effect that it need only be apparently imminent, and that whether or not it was so in any particular case is to be determined by looking at the circumstances from the standpoint of the accused, taking into consideration the relative strength of the accused and his assailant, and all the other circumstances. If to the accused there was a reasonably apparent necessity to kill to save himself, he will be excused, though to some one else there might not have seemed to be any such necessity, and though in fact there was no such necessity.[6] Most of the cases are to the effect that the circumstances must have been such as to excite the fears of a reasonable man, and that the accused must

[5] Dolan v. State, 81 Ala. 11, 1 South. 707; State v. Jump, 90 Mo. 171, 2 S. W. 279; Burgess v. Territory, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

[6] State v. Collins, 32 Iowa, 36; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; People v. Morine, 61 Cal. 367; State v. Matthews, 78 N. C. 523; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; State v. Shippey, 10 Minn. 223 (Gil. 178) 88 Am. Dec. 70; Steinmeyer v. People, 95 Ill. 383; Stanley v. Com., 86 Ky. 440, 6 S. W. 155, 9 Am. St. Rep. 305; Patillo v. State, 22 Tex. App. 586, 3 S. W. 766; State v. Eaton, 75 Mo. 586; People v. Gonzales, 71 Cal. 569, 12 Pac. 783; Patterson v. People, 46 Barb. (N. Y.) 625; Radford v. Com. (Ky.) 5 S. W. 343; Oder v. Com., 80 Ky. 32; Oakley v. Com. (Ky.) 11 S. W. 72; Bang v. State, 60 Miss. 571; State v. Donahoe, 78 Iowa, 486, 43 N. W. 297; People v. Williams, 32 Cal. 280; Barnards v. State, 88 Tenn. 183, 12 S. W. 431, at page 442; Smith v. State, 25 Fla. 517, 6 South. 482; Pinder v. State, 27 Fla. 370, 8 South. 837, 26 Am. St. Rep. 75; Brown v. Com., 86 Va. 466, 10 S. E. 745; State v. Evans, 33 W. Va. 417, 10 S. E. 792; Murray v. Com., 79 Pa. 311; Pistorius v. Com., 84 Pa. 158; Stoneman v. Com., 25 Grat. (Va.) 887; Abernethy v.

have acted as an ordinarily cautious and courageous man would have acted; or, in other words, there must have been a reasonable appearance of danger, or reasonable grounds to believe there was danger.[7] But the court and jury must look at the circumstances from the standpoint of the accused. A coward will fear danger unreasonably, and the mere fear of a coward, without reason therefor, is not enough.[8] A person must not be guilty of negligence in coming to the conclusion that he is in danger. Under such circumstances, the homicide will be manslaughter.[9] If a deadly weapon is presented or attempted to be presented, whether there is any intention to use it or not, and though it may not be loaded, the person so threatened may reasonably assume that there is an intent to use it, and may act on the assumption;[10] but a person cannot repel the attack of an unarmed man, not his superior in physical power, by killing him, and

Com., 101 Pa. 322; Schnier v. People, 23 Ill. 17; Cahill v. People, 106 Ill. 621; Barr v. State, 45 Neb. 458, 63 N. W. 856; Enright v. People, 155 Ill. 32, 39 N. E. 561; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528.

[7] Creek v. State, 24 Ind. 151; State v. Crawford, 66 Iowa, 318, 23 N. W. 684; Kendrick v. State, 55 Miss. 436; Shorter v. People, 2 N. Y. 193; People v. Austin, 1 Parker, Cr. R. (N. Y.) 154, at page 164; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; Field v. Com., 89 Va. 690, 16 S. E. 865; Askew v. State, 94 Ala. 4, 10 South. 657, 33 Am. St. Rep. 83; State v. Parker, 106 Mo. 217, 17 S. W. 180; State v. Morey, 25 Or. 241, 35 Pac. 655, 36 Pac. 573; People v. Lynch, 101 Cal. 229, 35 Pac. 860; State v. Lymmes (S. C.) 19 S. E. 16; Amos v. Com. (Ky.) 28 S. W. 152. And see cases cited in preceding note.

[8] Golden v. State, 25 Ga. 527, at page 533; Gallery v. State, 92 Ga. 463, 17 S. E. 863. But see Grainger v. State, 5 Yerg. (Tenn.) 459, 26 Am. Dec. 278.

[9] U. S. v. Heath (D. C.) 19 Wash. Law Rep. 818.

[10] People v. Anderson, 44 Cal. 65. But see State v. Bodie, 33 S. C. 117, 11 S. E. 624.

then set up the plea of self-defense;[11] nor can he kill an assailant who has turned away, and manifested an intention to abandon the conflict.[12] In all cases there must be an actual bona fide belief in danger. If a person kills an assailant when he does not believe he is in danger of death or grievous bodily harm, he will not be excused because it afterwards appears that there was such danger.[13] There can be no such thing as accidental self-defense.[14]

Duty to Retreat and Avoid Danger.

The law in regard to self-defense does not consider the wounded pride which may result from declining to fight, or the sense of shame a man may feel in being denounced as a coward,[15] but requires that, to bring a homicide within the excuse of self-defense, the accused must show that he endeavored to avoid any further struggle, and retreated.[16] He must have retreated if there was a way of escape open to him, and have done all in his power to avert the necessity of killing his adversary. The law, however, only requires

[11] Hall v. State (Miss.) 1 South. 351.

[12] Meurer v. State, 129 Ind. 587, 29 N. E. 392; Shorter v. People, 2 N. Y. 193.

[13] People v. Gonzales, 71 Cal. 569, 12 Pac. 783; Trogdon v. State, 133 Ind. 1, 32 N. E. 725; State v. Jackson, 32 S. C. 27, 10 S. E. 769.

[14] State v. Smith, 114 Mo. 406, 21 S. W. 827.

[15] Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85.

[16] Duncan v. State, 49 Ark. 543, 6 S. W. 164; People v. Cole, 4 Parker, Cr. R. (N. Y.) 35; State v. Hill, 20 N. C. 629, 34 Am. Dec. 396; Squire v. State, 87 Ala. 114, 6 South. 303; Carter v. State, 82 Ala. 13, 2 South. 766; Com. v. Ware, 137 Pa. 465, 20 Atl. 806; Sullivan v. State, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22; State v. Jones, 89 Iowa, 182, 56 N. W. 427; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528; People v. Constantino, 153 N. Y. 24, 47 N. E. 37. Retreat is not necessary under the Texas statute. Williams v. State, 30 Tex. App. 429, 17 S. W. 1071.

a man to retreat when he can safely do so. He is not bound to retreat if to do so would probably render him liable to death or grievous bodily harm because of the fierceness of his assailant's attack.[17] The mere fact that retreat will not place him in less peril, or on better vantage ground than before, does not excuse him from the performance of this duty.[18] As has already been said, one who is assaulted in his own house is not bound to retreat, but may stand his ground.[19]

Accused as the Aggressor.

Self-defense is no excuse for a homicide if the accused brought on the difficulty, and was himself the aggressor.[20] If, however, after bringing on the difficulty, a person in good

[17] State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; Creek v. State, 24 Ind. 151; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52; State v. Donnelly, 69 Iowa, 705, 27 N. W. 369, 58 Am. Rep. 234; People v. Macard, 73 Mich. 15, 40 N. W. 784; Duncan v. State, 49 Ark. 543, 6 S. W. 164; State v. Sorenson, 32 Minn. 118, 19 N. W. 738; State v. Rheams, 34 Minn. 18, 24 N. W. 302.

[18] Carter v. State, 82 Ala. 13, 2 South. 766.

[19] Ante, p. 170, note 48.

[20] 1 Hale, P. C. 482; Stewart v. State, 1 Ohio St. 66; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; State v. Lane, 26 N. C. 113; State v. Scott, 41 Minn. 365, 43 N. W. 62; People v. Robertson, 67 Cal. 646, 8 Pac. 600; Helm v. State, 67 Miss. 562, 7 South. 487; Allen v. State, 66 Miss. 385, 6 South. 242; Clifford v. State, 58 Wis. 477, 17 N. W. 304; Hasson v. Com. (Ky.) 11 S. W. 286; State v. Neeley, 20 Iowa, 108; State v. Murdy, 81 Iowa, 603, 47 N. W. 867; State v. Jump, 90 Mo. 171, 2 S. W. 279; Thompson v. State (Miss.) 9 South. 298; Atkins v. State, 16 Ark. 568; Gaines v. Com., 88 Va. 682, 14 S. E. 375; Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; State v. Hawkins, 18 Or. 476, 23 Pac. 475; State v. Brittain, 89 N. C. 481; Kinney v. People, 108 Ill. 519; Fussell v. State (Ga.) 19 S. E. 891. Merely taking a weapon along for protection does not make one an aggressor. Radford v. Com. (Ky.) 5 S. W. 343.

faith withdraws, and shows his adversary that he does not desire to continue the conflict, and his adversary pursues him, he has the same right to defend himself as if he had not originally provoked the difficulty,[21] but the withdrawal must be in good faith.[22] If he withdraws, and gives his adversary reasonable ground for believing that he has withdrawn, it is sufficient.[23] Some of the cases seem to hold that, to deprive an aggressor of the right of self-defense, he must have brought on the difficulty with felonious intent;[24] but the great weight of authority is to to the contrary;[25] and even in these cases a careful examination will probably show that the court does not mean that the accused will be excused altogether if he brought on the difficulty without a felonious intent, but that in such case he will be guilty of manslaughter.[26] The felonious intent is necessary for mur-

[21] Storey's Case, 71 Ala. 330; Stoffer's Case, 15 Ohio St. 47, 86 Am. Dec. 470; Hittner v. State, 19 Ind. 48; Parker v. State, 88 Ala. 4, 7 South. 98; State v. Hill, 20 N. C. 629, 34 Am. Dec. 396; Brazzil v. State, 28 Tex. App. 584, 13 S. W. 1006; Oakley v. Com. (Ky.) 11 S. W. 72; Hash v. Com., 88 Va. 172, 13 S. E. 398; Barnard v. Com. (Ky.) 8 S. W. 444; Crane v. Com. (Ky.) 13 S. W. 1079; State v. Thompson (La.) 13 South. 392; Wills v. State (Tex. Cr. App.) 22 S. W. 969; Johnson v. State, 58 Ark. 57, 23 S. W. 7; Rowe v. U. S., 164 U. S. 546, 17 Sup. Ct. 172, 41 L. Ed. 547.

[22] 1 Hale, P. C. 479, 480; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470; Parker v. State, 88 Ala. 4, 7 South. 98; People v. Wong Ah Teak, 63 Cal. 544.

[23] State v. Dillon, 74 Iowa, 653, 38 N. W. 525.

[24] State v. Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; State v. Parker, 96 Mo. 382, 9 S. W. 728; State v. McDaniel, 94 Mo. 301, 7 S. W. 634; State v. Parker, 106 Mo. 217, 17 S. W. 180; Hash v. Com., 88 Va. 172, 13 S. E. 398.

[25] See footnotes 20–23. And see Polk v. State, 30 Tex. App. 657, 18 S. W. 466; Sullivan v. State, 31 Tex. Cr. R. 486, 20 S. W. 927, 37 Am. St. Rep. 826.

[26] State v. Gilmore, 95 Mo. 554, 8 S. W. 359; State v. Hardy, 95 Mo. 455, 8 S. W. 416; State v. Davidson, 95 Mo. 155, 8 S. W. 413.

der, but not for manslaughter. A person may be the aggressor, in the eye of the law, by doing wrongful acts provoking another to attack him. Some courts hold that a man who is caught in adultery with another's wife is so far the aggressor that he cannot defend himself against an attack by the husband, and, after killing him, set up the plea of self-defense; he will be guilty of manslaughter at least.[27] A man will not be deemed the aggressor, within this rule, merely because his acts provoked the difficulty, unless they were calculated or intended to have that effect.[28] It follows from what has already been said that where the original aggressor ceases the attack, and shows that he has abandoned it, and the person assailed renews the difficulty, he becomes in turn the aggressor, and cannot plead self-defense if he kills the original aggressor to save his life.[29]

Defense of Person in Family Relation.

The killing of a person in defense of those standing in the relation of husband and wife, parent and child, master and servant, or guest and host, is regarded in law as the

[27] Reed v. State, 11 Tex. App. 509, 40 Am. Rep. 795; Drysdale v. State, 83 Ga. 744, 10 S. E. 358, 6 L. R. A. 424, 20 Am. St. Rep. 340. It is otherwise where the circumstances are such that the husband has no right to attack the adulterer. Wilkerson v. State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63. A man may defend himself against an attack by the father of a girl with whom he has been having intercourse with her consent. Varnell v. State, 26 Tex. App. 56, 9 S. W. 65. A person who goes to another's house merely to secure a place to sleep, and, not finding the husband, lies down, by permission of the wife, in an adjoining room until 2 o'clock in the morning, when the husband returns, and attacks him, may defend himself. Franklin v. State, 30 Tex. App. 628, 18 S. W. 468.

[28] White v. State, 23 Tex. App. 154, 3 S. W. 710; Johnson v. State, 26 Tex. App. 631, 10 S. W. 235; Saens v. State (Tex. Cr. App.) 20 S. W. 737.

[29] Allen v. State, 24 Tex. App. 216, 6 S. W. 187.

act of the person defended, and is excused to the same extent as if in fact committed by him.[30] Some of the cases even go so far as to say that any person can defend another, whether he is bound to protect him or not,—that whatever a person may do for himself he may do for another.[31] The right to defend another, however, can be no greater than the right of the other to defend himself;[32] so that if a person brings on a difficulty, so that he could not, if he killed his opponent, set up the plea of self-defense, his brother, if he kills him, cannot set up the plea.[33]

FELONIOUS HOMICIDE IN GENERAL.

69. Felonious homicide is the killing of a human being without justification or excuse, and may be

(a) Murder, or

(b) Manslaughter.

MURDER.

70. Murder at common law is unlawful homicide with malice aforethought.[1]

[30] Reg. v. Rose, 15 Cox, Cr. Cas. 540; Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; Chittenden v. Com. (Ky.) 9 S. W. 386; Pond v. People, 8 Mich. 150; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Hathaway v. State, 32 Fla. 56, 13 South. 592. See, also, ante, p. 175.

[31] Ante, p. 175.

[32] A parent has no right to protect a child in the commission of a crime. State v. Herdina, 25 Minn. 161.

[33] State v. Melton, 102 Mo. 683, 15 S. W. 139; Saens v. State (Tex. Cr. App.) 20 S. W. 737; State v. Brittain, 89 N. C. 482. And see Jones v. Fortune, 128 Ill. 518, 21 N. E. 523.

§§ 69–72. [1] Steph. Dig. Cr. Law, art. 223. See 4 Bl. Comm. 194.

MALICE AFORETHOUGHT.

71. Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of sudden passion, caused by adequate provocation, as hereafter explained).

(b) Knowledge that the act which causes the death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) Intent to commit any felony.

(d) An intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed.[2]

72. Murder is a felony at common law, and is punishable by death.

Malice Aforethought.

To constitute the crime of murder, the killing must be with "malice aforethought." Where malice aforethought exists, every homicide is murder.[3] "Malice" does not necessarily mean hatred or personal ill will towards the person killed, nor an actual intent to take his life, or even to take any one's life. The killing may be for the purpose of robbery, without any hatred or ill will against the person killed;

[2] Following Steph. Dig. Cr. Law, art. 223.

[3] State v. Spangler, 40 Iowa, 365; Murphy v. State, 31 Ind. 511; People v. Crowey, 56 Cal. 36; McMillan v. State, 35 Ga. 54.

or it may be the killing of one person in an attempt to kill another; or the killing may be unintentional, and done in the commission of some other crime, or while merely doing a reckless and dangerous act; and in either case the person causing the death may have what the law deems "malice aforethought." It is impossible to give a satisfactory definition of the term. Thus it has been said: "The words 'malice aforethought' long ago acquired in law a settled meaning, somewhat different from the popular one. In their legal sense they do not import an actual intention to kill the deceased. The idea is not spite or malevolence to the deceased in particular, but evil design in general; the dictate of a wicked, depraved, and malignant heart; not premeditated personal hatred or revenge towards the person killed, but that kind of unlawful purpose which, if persevered in, must produce mischief." [4] Such general expressions obviously afford little practical guidance. Again, malice is frequently divided into express malice and implied malice, but the distinction is of little value, and is often misleading.* The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.† In short, the words

[4] State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Davidson v. State, 135 Ind. 254, 34 N. E. 972; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Wellar v. People, 30 Mich. 16; Nye v. People, 35 Mich. 16; Ellis v. State, 30 Tex. App. 601, 18 S. W. 139; Com. v. Drum, 58 Pa. 9; McClain v. People, 110 Pa. 263, 1 Atl. 45; Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698; State v. Decklotts, 19 Iowa, 447.

* See Steph. Dig. Cr. Law, append. note xiv., 2 Bish. New Cr. Law, § 675.

† Reg. v. Doherty, 16 Cox, Cr. Cas. 306; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; People v. Clark, 7 N. Y. 385; People

"malice aforethought" are technical, and must be interpreted in the light of a long series of decided cases, which have given them an artificial meaning.[5] Malice aforethought may mean any one of the states of mind enumerated in the black-letter text, and any definition broad enough to cover them all would be vague and unsatisfactory.

Intention to Cause Death or Bodily Harm.

The rule that a man is presumed to intend his voluntary acts and their natural and ordinary consequences is applicable to murder. If a man strikes another with a deadly weapon,[6] or inflicts grievous bodily injury upon him, or

v. Williams, 43 Cal. 344; State v. Anderson, 2 Overt. (Tenn.) 6, 5 Am. Dec. 648; Nye v. People, 35 Mich. 16; Cook v. State, 77 Ga. 96; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; Mitchum v. State, 11 Ga. 615; State v. Dennison, 44 La. Ann. 135, 10 South. 599; State v. Ashley, 45 La. Ann. 1036, 13 South. 738; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528.

[5] The term "is a mere popular phrase unluckily introduced into an act of parliament, and half explained away by the judges. It throws no light whatever upon the crime of murder, and never was used in the natural sense of premeditation. On the other hand, it served as a sort of standing hint, for it was equivalent to saying that there were two kinds of homicide,—homicide with premeditation, or other circumstances indicating the same sort of malignity; and homicide provoked by a sudden quarrel, or accompanied by circumstances indicative of a less degree of malignity." Steph. Dig. Cr. Law, append. note xiv. See, also, Reg. v. Serné, 16 Cox, Cr. Cas. 311.

[6] Grey's Case, J. Kelyng, 64; Com. v. York, 9 Metc. (Mass.) 103, 43 Am. Dec. 373; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Rainsbarger, 71 Iowa, 746, 31 N. W. 865; State v. Thomas, 98 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351; McKee v. State, 82 Ala. 32, 2 South. 451; Territory v. Hart, 7 Mont. 489, 17 Pac. 718; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; Clem v. State, 31 Ind. 480; Murphy v. State, Id. 511; State v. Christian, 66 Mo. 138; Evans v. State, 44 Miss. 762.

does any act which is likely to cause death,[7] and death results, he is presumed to have intended to kill him. The homicide is murder unless it is justifiable or excusable, or committed under such circumstances of provocation as reduce it to manslaughter.[8] On the other hand, if the act, although unlawful, is not one likely to cause death,—as in the case of a blow with a small stick by one who does not intend to kill or cause grievous bodily harm, and death unexpectedly results,—the crime is not murder, but merely manslaughter.[9]

Knowledge that Act will Probably Cause Death or Injury.

The same principle applies to cases where a person does an act with knowledge that it will probably cause death or grievous bodily harm to some person, although he has no actual intention to injure any person, and may wish the contrary. Thus, if a man recklessly throws from the roof into a crowded street a heavy piece of timber, which kills a person in the street, he is guilty of murder. So, if a person intentionally fires a pistol in a crowded street, and kills another, this is murder.[10] So, where a man violently threw a heavy beer glass towards his wife, breaking a lighted lamp carried by her, and scattering ignited oil over her clothes. and causing her death, the evidence of malice was sufficient to constitute the act murder. "It was utterly imma-

[7] Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Wellar v. People, 30 Mich. 16; Reg. v. Serné, 16 Cox, Cr. Cas. 311. Willful exposure of person to weather, Territory v. Manton, 8 Mont. 95, 19 Pac. 387. Willfully withholding food from child with determination to cause death. Reg. v. Conde, 10 Cox, Cr. Cas. 547

[8] Post, p. 197.

[9] Post, p. 204.

[10] Pool v. State, 87 Ga. 526, 13 S. E. 556; Holt v. State, 89 Ga. 316, 15 S. E. 316; Brown v. Com. (Ky.) 17 S. W. 220; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493.

terial," said the court, "whether the plaintiff in error intended the glass should strike his wife, his mother-in-law, or his child, or whether he had any specific intent, but acted solely from general malicious recklessness, disregarding any and all consequences." [11]

Intent to Commit Felony.

As we have seen, where a man does a criminal act, while actually intending to do another criminal act, he is, as a rule, criminally liable for the latter act, the actual criminal intent concurring with the act done being enough to make that act a crime.[12] This rule of constructive intent applies to murder, provided the intended crime is a felony. If, however, the intended crime is merely a misdemeanor, and the wrongdoer unintentionally causes some person's death, the homicide is only manslaughter.[13] Thus, if a man shoots at another with the intention of killing him, and kills a bystander, he is guilty of the murder of the person killed.[14] The same principle applies where a person lays poison for one man, and another drinks it and dies.[15] It is murder if a robber accidentally kills his victim, or if a person commits arson by setting fire to a dwelling house, and accidentally burns the occupant.[16] So, where suicide is a felony, a

[11] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698.

[12] Ante, p. 53.

[13] Post, p. 204.

[14] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; State v. Gilmore, 95 Mo. 554, 8 S. W. 359; Angell v. State, 36 Tex. 542; State v. Renfrow, 111 Mo. 589, 20 S. W. 299; Jennings v. Com. (Ky.) 16 S. W. 348; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493.

[15] Gore's Case, 9 Coke, 81a; Saunders' Case, 2 Plowd. 473; Johnson v. State, 92 Ga. 36, 17 S. E. 974.

[16] Reg. v. Serné, 16 Cox, Cr. Cas. 311; Wellar v. People, 30 Mich. 16; State v. Shelledy, 8 Iowa, 477; State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776; Com. v. Drum, 58 Pa. 9; State v. McNab, 20 N. H. 160; State v. Barrett, 40 Minn. 77, 41 N. W. 463; People v. Olsen,

person who attempts to commit suicide and accidentally kills one who is trying to prevent the deed commits murder.[17] Abortion is only a misdemeanor at common law, while to procure the miscarriage of a woman before the child has quickened in the womb is no crime at all; and for this reason, causing the mother's death in attempting to commit an abortion or procure a miscarriage is manslaughter only at common law, provided, of course, the attempt is not made in a way that endangers the mother's life. In the latter case it is murder. In some states, however, abortion is made a felony by statute, and it is so whether the child has quickened or not. It follows from this that, in those states, causing the mother's death in an attempt to procure an abortion is murder, as it is caused in committing a felony.[18]

Resisting Officer.

"When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him; and, consequently, if he is killed

80 Cal. 122, 22 Pac. 125; Reddick v. Com. (Ky.) 33 S. W. 416; Reg. v. Greenwood, 7 Cox, Cr. Cas. 404 (communicating venereal disease while committing rape, and death resulting from disease). In Reg. v. Serné, supra, Stephen, J., expressed the opinion that the rule should be limited to "any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which causes death." Cf. Com. v. Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

[17] State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.

[18] State v. Smith, 32 Me. 369, 54 Am. Dec. 578; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Com. v. Jackson, 15 Gray (Mass.) 187; State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776; Peoples v. Com., 87 Ky. 487, 9 S. W. 509, 810. For cases in which the crime is manslaughter only at common law and by statute, see post, p. 206, note 12.

in the execution of his duty, it is, in general, murder, even though there be such circumstances of hot blood and want of premeditation as would, in ordinary cases, reduce the crime to manslaughter." [19] If such person is engaged in making a lawful arrest, and the person sought to be arrested, in resisting the arrest, kills the other, the homicide is murder.[20] It is also murder if death is caused in resisting a lawful attempt, either by an officer or a private person, to suppress a riot or affray.[21] If the killing occurs in resisting an arrest, the offender must have notice that the person killed is such officer, or other person having a right to make the arrest, so employed. Notice may be given by words, by production of a warrant or other legal authority, by the known official character of the person so employed, or by the circumstances of the case.[22] As we shall see, if an arrest is unlawfully attempted, the fact may be sufficient provocation to reduce the crime to manslaughter.[23]

[19] Reply of Blackburn, J., to statement submitted in Reg. v. Allen, Steph. Dig. Cr. Law, append. note xv.

[20] Yong's Case, 4 Coke, 40a; Rex. v. Ford, Russ. & R. 329; Mockabee v. Com., 78 Ky. 380; People v. Pool, 27 Cal. 572; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Tom v. State, 8 Humph. (Tenn.) 86; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Snelling v. State, 87 Ga. 50, 13 S. E. 154; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; State v. Mowry, 37 Kan. 369, 15 Pac. 282; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Dilger v. Com., 88 Ky. 550, 11 S. W. 651; Weatherford v. State, 31 Tex. Cr. R. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

[21] Ashton's Case, 12 Mod. 256; Reg. v. Hagan, 8 Car. & P. 167; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Vollmer v. State, 24 Neb. 838, 40 N. W. 420.

[22] Tomson's Case, J. Kelyng, 66; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Steph. Dig. Cr. Law, art. 223.

[23] Post, p. 201.

Presumption of Malice.

The law has frequently been declared that every person who kills another is presumed to have killed him with malice aforethought, unless the circumstances are such as to raise a contrary presumption; and the burden of proving circumstances of excuse, justification, or provocation is upon the person who is shown to have killed another.[24] And it has been held that the evidence of excuse, justification, or extenuation must preponderate, and that it is not enough to raise a reasonable doubt. Malice aforethought, however, being an essential element in murder, upon principle the burden of proving malice, like any other fact, beyond a reasonable doubt, rests upon the prosecution.[25] If, from the facts and circumstances accompanying the homicide as given in evidence by the prosecution or by the defense, no circumstances of excuse, justification, or provocation appear, the burden of proof is sustained by proof of the homicide.[26] But, if the facts and circumstances give rise to a reasonable doubt, the doubt should avail in favor of the accused. If, upon the whole evidence, the jury have a reasonable doubt whether the accused is guilty of the higher offense, they should acquit him. This view has been sustained by many recent cases.[27]

[24] Steph. Dig. Cr. Law, art. 230; Rex v. Greenacre, 8 Car. & P. 35.

[25] Com. v. York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State v. Byers, 100 N. C. 512, 6 S. E. 420; U. S. v. Crow Dog, 3 Dak. 106, 14 N. W. 437.

[26] People v. Fish, 125 N. Y. 136, 26 N. E. 319.

[27] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; State v. Porter, 34 Iowa, 131; People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549; Kent v. People, 8 Colo. 563, 9 Pac. 852. See dissenting opinion of Wilde, J., in Com. v. York, supra.

Suicide or Self-Murder.

Suicide is murder at common law if committed deliberately by one who has the mental capacity necessary to render him capable of committing crime, or if it results to a person having such capacity from his malicious attempt to kill another.[28] In England the punishment for suicide was, at one time forfeiture of goods and an ignominious burial, but the former mode of punishment has been done away with, and the only punishment now, if indeed there is any, is denial of Christian burial. In the United States the person committing suicide is not punished, and it has even been held that suicide is not a crime.[29] Even though suicide cannot be punished, it is wrong per se, and it has been said that it is still a crime;[30] but it cannot be a crime, for no act is a crime unless it is prohibited "under pain of a punishment."[31] Suicide, however, being a felony at common law, it has been held that one who counsels another to commit suicide, and is present when the act is committed, is guilty of murder, as a principal in the second degree.[32] If the adviser is absent at the time of the suicide, he cannot be punished at common law, as he is an accessary before the fact, and cannot be punished until conviction of the principal.[33] If two persons agree together to commit suicide, and only one of them kills himself, the other is

[28] 1 Hale, P. C. 413; 4 Bl. Comm. 189.

[29] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; Darrow v. Society, 116 N. Y. 542, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430.

[30] State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 783.

[31] Ante, p. 1 et seq.

[32] Rex v. Tyson, Russ. & R. 523; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154; Com. v. Dennis, 105 Mass. 162.

[33] Reg. v. Leddington, 9 Car. & P. 79; ante, p. 111.

guilty of murder.[34] At common law an attempt to commit suicide is a misdemeanor, all attempts to commit felonies being misdemeanors.[35] Such an attempt has been held in Massachusetts not to be punishable, but this was on the ground that attempts were fully covered by statutes, and that, therefore, no common-law attempts could be recognized.[36]

Statutory Degrees of Murder.

At common law there are no degrees of murder. All felonious homicides other than manslaughter are simply murder, and punishable by death. Beginning with Pennsylvania, however, most of the states have divided murder into two, and some have divided it into three, degrees, according to the heinousness of the deed; murder in the first degree being generally where there is a premeditated design to effect the death of the person killed, or of some other person. It would be impracticable to set out the statutes of the different states. They differ somewhat, and each student must consult the statute of his own particular state. If he understands murder at common law thoroughly, he will have no difficulty in understanding the statutory degrees from a mere reading of the statute.

[34] Reg. v. Alison, 8 Car. & P. 418.
[35] Reg. v. Doody, 6 Cox, Cr. Cas. 463.
[36] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.

MANSLAUGHTER IN GENERAL.

73. Manslaughter is unlawful homicide without malice aforethought, and is either

(a) Voluntary, or

(b) Involuntary.

74. Manslaughter is a felony.

VOLUNTARY MANSLAUGHTER.

75. Voluntary manslaughter is where the act causing death is committed in the heat of sudden passion, caused by provocation.[1]

(a) The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man.

(b) The act must be committed under and because of the passion.

(c) The provocation must not be sought or induced as an excuse for killing or doing bodily harm.

As stated in another connection, the law, regarding the infirmities of human nature, recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.[2] Homicide thus committed is manslaughter. It is distinguished from murder by the absence of malice aforethought. The killing need not necessarily be unintentional.[3]

§§ 73–75. [1] 4 Bl. Comm. 191.

[2] State v. Hill, 20 N. C. 491, 34 Am. Dec. 396; Slaughter v. Com., 11 Leigh (Va.) 681, 37 Am. Dec. 638.

[3] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; People v. Freel, 48 Cal. 436; Dennison v. State, 13 Ind. 510; State v. McDonnell, 32 Vt. 491, 541; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; People v. Lilley, 43 Mich. 521, 5 N. W. 928; Nye v. People, 35 Mich. 16.

Intentional killing is only manslaughter if it is committed under and by reason of a passion caused by what the law deems sufficient provocation. The law does not merely look to see if a man was provoked and enraged, and, if so, reduce his crime to manslaughter, but it also looks at the provocation, and does not excuse him at all if it was not adequate to excite his passion. The provocation must be sufficient in the eye of the law, or the crime is murder.[4] It has been said that the provocation must be such as is calculated to give rise to irresistible passion in the mind of a reasonable man.[5] It is also necessary that the act causing death shall be committed because of the provocation,[6] for otherwise the homicide will be committed with malice aforethought, and the crime will be murder. A killing with malice aforethought cannot be manslaughter.[7] The provocation must

[4] Reese v. State, 90 Ala. 624, 8 South. 818.

[5] Territory v. Catton, 5 Utah, 451, 16 Pac. 902. "The law contemplates the case of a reasonable man, and requires that the provocation shall be such that such a man might naturally be induced, in the anger of the moment, to commit the act." Per Keating, J., in Reg. v. Welsh, 11 Cox, Cr. Cas. 336. It is said in a Michigan case that the reason should at the time of the act be disturbed or obscured by passion, to an extent which might render ordinary men, of fair average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment. Maher v. People, 10 Mich. 212, 81 Am. Dec. 781. Rejection of a suitor by a woman is not sufficient. State v. Kotovsky, 74 Mo. 247.

[6] Reg. v. Kirkham, 8 Car. & P. 45; Slaughter v. Com., 11 Leigh (Va.) 681, 37 Am. Dec. 638; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Collins v. U. S., 150 U. S. 62, 14 Sup. Ct. 9, 37 L. Ed. 998.

[7] State v. Johnson, 23 N. C. 354, 35 Am. Dec. 742; State v. Hildreth, 31 N. C. 429, 51 Am. Dec. 364; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Miller v. State, 32 Tex. Cr. R. 319, 20 S. W. 1103; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; People v. Lilley, 43 Mich. 521, 5 N. W. 928; Collins v. U. S., 150 U. S. 62, 14 Sup. Ct. 9, 37 L. Ed. 998; Slaughter v. Com., 11 Leigh (Va.) 681, 37 Am. Dec.

deprive one of the power of self-control,[8] but it need not "entirely dethrone reason."[9] Whether or not this was so in any given case is a question for the jury, to be determined from the particular circumstances, having regard to the nature of the act by which death was caused, the time which elapsed between the provocation and the act, and the conduct of the accused during that time.[10] The blow must not only have been inflicted while the accused was under the influence of the provocation, but it must have been inflicted at once. If there was sufficient time for his passion to cool, he is guilty of murder, though his passion has not in fact subsided.[11] Nor is the provocation available as a defense if it was sought for and induced by the accused with intent to resent it.[12]

Adequacy of Provocation.

An assault and battery of such a nature as to inflict actual bodily harm or great insult is deemed in law sufficient provo-

638; Brown v. Com., 86 Va. 466, 10 S. E. 745; State v. Green, 37 Mo. 466; Riggs v. State, 30 Miss. 635; State v. Gooch, 94 N. C. 987; State v. Hensley, Id. 1021.

[8] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; Davis v. People, 114 Ill. 86, 29 N. E. 192.

[9] Smith v. State, 83 Ala. 26, 3 South. 551.

[10] Reg. v. Welsh, 11 Cox, Cr. Cas. 336; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; State v. Hoyt, 13 Minn. 132 (Gil. 125).

[11] Reg. v. Young, 8 Car. & P. 644; State v. McCants, 1 Speers (S. C.) 384; State v. Jacobs, 28 S. C. 29, 4 S. E. 799; People v. Lilley, 43 Mich. 521, 5 N. W. 928; State v. Grayor, 89 Mo. 600, 1 S. W. 365; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; State v. Moore, 69 N. C. 267; Kilpatrick v. Com., 31 Pa. 198; State v. Hoyt, 13 Minn. 132 (Gil. 125); Com. v. Aiello, 180 Pa. 597, 36 Atl. 1079.

[12] Stewart v. State, 1 Ohio St. 66; State v. Hill, 20 N. C. 629, 34 Am. Dec. 396; Melton v. State, 24 Tex. App. 47, 5 S. W. 652; State v. McDaniel, 94 Mo. 301, 7 S. W. 634; People v. Robertson, 67 Cal. 647, 8 Pac. 300.

cation to the person assaulted; and if, in a passion caused by the provocation, he at once kills his assailant, he is guilty of manslaughter only.[13] For a child, however, or a woman, to strike a man, might not be sufficient;[14] certainly a blow by a little child would not be, for it could inflict neither harm nor insult. Under some circumstances an assault may be provocation to others than the person assaulted; as, for instance, where a father is provoked by seeing his child whipped.[15] It has even been held that the beating of a wife by her husband is provocation to her father.[16] On the other hand, it has been held that knowledge by a brother of his sister's seduction is not such provocation as will reduce his killing of the seducer to manslaughter,[17] and that anger and resentment because deceased killed defendant's friend or cousin is not sufficient.[18] If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, and it is immaterial which is right in the quarrel, or which struck the first blow.[19] It must be remembered, however, that the killing of a person in mutual com-

[13] Fost. Crown Law, 292; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Williams v. State, 25 Tex. App. 216, 7 S. W. 666; Hurd v. People, 25 Mich. 405; Schlect v. State, 75 Wis. 486, 44 N. W. 509.

[14] A blow by a woman with an iron patten, drawing blood, sufficient. Stedman's Case, Fost. Crown Law, 292.

[15] McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196.

[16] Campbell v. Com., 88 Ky. 402, 11 S. W. 290, 21 Am. St. Rep. 348.

[17] State v. Hockett, 70 Iowa, 442, 30 N. W. 742.

[18] State v. Gut, 13 Minn. 341 (Gil. 315); Reese v. State, 90 Ala. 624, 8 South. 818. Contra where defendant saw his friend shot down by deceased. Moore v. State, 26 Tex. App. 322, 9 S. W. 610.

[19] State v. Massage, 65 N. C. 480; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Gann v. State, 30 Ga. 67; State v. McCants, 1 Speers (S. C.) 384; Maher v. People, 10 Mich. 212, 81

bat must be caused by the provocation, and that otherwise the crime is murder; and the mere fact of struggle is not enough to raise the presumption of passion, where the circumstances are as consistent with premeditated malice as with heat of passion.[20] An unlawful imprisonment is provocation to the person imprisoned.[21] So, also, is an attempt to arrest by officers of justice whose character as such is unknown,[22] or whose character is known, but who are acting without a warrant where a warrant is necessary, or under a warrant which is so irregular as to make the arrest illegal.[23] Some courts have apparently held that killing in resistance of an unlawful arrest is justifiable or excusable, and does not even amount to manslaughter, but this was

Am. Dec. 781; State v. McDonnell, 32 Vt. 491; Battle v. State, 92 Ga. 465, 17 S. E. 861; State v. Hildreth, 31 N. C. 429, 51 Am. Dec. 364; State v. Hill, 20 N. C. 629, 34 Am. Dec. 396; State v. Roberts, 8 N. C. 349, 9 Am. Dec. 643; Schlect v. State, 75 Wis. 486, 44 N. W. 509. If the slayer uses concealed weapons, or otherwise takes an undue advantage, the homicide is murder. Price v. State, 36 Miss. 531, 72 Am. Dec. 195; State v. Ellick, 60 N. C. 450, 86 Am. Dec. 442. Quarrel, abusive language, and excitement, Perkins v. State, 78 Wis. 551, 47 N. W. 827.

[20] State v. Jones, 98 N. C. 651, 3 S. E. 507.

[21] But not, it seems, to bystanders. See Huggett's Case, J. Kelyng, 59; Steph. Dig. Cr. Law, art. 224.

[22] Yates v. People, 32 N. Y. 509; Mockabee v. Com., 78 Ky. 380; Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Drennan v. People, 10 Mich. 169.

[23] Reg. v. Thompson, 1 Moody, Cr. Cas. 80; Drew's Case, 4 Mass. 391; Rafferty v. People, 69 Ill. 111, 18 Am. Rep. 601; Id., 72 Ill. 37; Jones v. State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; People v. Burt, 51 Mich. 200, 16 N. W. 378; Briggs v. Com., 82 Va. 554; State v. Scheele, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106; Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812; State v. Spaulding, 34 Minn. 361, 25 N. W. 793.

no doubt where life or grievous bodily harm was threatened.[24] The fact, however, that an attempted arrest is illegal will not reduce the killing in resisting it to manslaughter, unless the accused knew it was illegal; for, as stated in the black-letter text, the killing must have been because of adequate provocation, and, if the accused did not know the arrest was unlawful, there was no provocation.[25] The sight by a husband of the act of adultery committed by his wife is provocation to him on the part both of the wife and her paramour; and, if he kills either or both, he is guilty of manslaughter only.[26] He must see the act, however, for mere knowledge of his wife's infidelity is not sufficient.[27]

[24] Simmerman v. State, 14 Neb. 568, 17 N. W. 115.

[25] Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812. And see Graham v. State, 28 Tex. App. 582, 13 S. W. 1010.

[26] Pearson's Case, 2 Lewin, Cr. Cas. 216; State v. Samuel, 48 N. C. 74, 64 Am. Dec. 596; Hooks v. State, 99 Ala. 166, 13 South. 767; Mays v. State, 88 Ga. 399, 14 S. E. 560; State v. Pratt, Houst. Cr. Cas. (Del.) 265; Jones v. People, 23 Colo. 276, 47 Pac. 275. That circumstances are so compromising as to induce reasonable belief that adultery is being committed is sufficient. State v. Yanz, (Conn.) 50 Atl. 37, 54 L. R. A. 780. But see Shufflin v. People, 62 N. Y. 229, 20 Am. Rep. 483. One who is merely the husband's agent for the purpose of detecting the wife's adultery is not within the rule, People v. Horton, 4 Mich. 67; nor is a brother seeing adultery with his sister, Lynch v. Com., 77 Pa. 205.

[27] 1 Hale, P. C. 486; Fost. Crown Law, 296; State v. Samuel, 48 N. C. 74, 64 Am. Dec. 596; State v. Neville, 51 N. C. 423; State v. John, 30 N. C. 330, 49 Am. Dec. 396; State v. Anderson, 98 Mo. 461, 11 S. W. 981; Sawyer v. State, 35 Ind. 83; State v. Avery, 64 N. C. 609; State v. Harman, 78 N. C. 519; Bugg v. Com. (Ky.) 38 S. W. 684. But see Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, and Reg. v. Rothwell, 12 Cox, Cr. Cas. 145. In the latter case Blackburn, J., instructed the jury that although, in general, mere words are not enough, they may be under special circumstances; as, if a husband, being told by his wife that she had committed adultery, and having no idea of it before, were thereupon to kill her. Under

Neither insulting and abusive words or gestures,[28] nor trespass or other injuries to property,[29] nor breaches of contract,[30] of themselves amount to sufficient provocation for an act of resentment likely to endanger life. In Texas the statute makes insults to a man's female relatives sufficient provocation to reduce a killing to manslaughter.[31] In all

statutes in some states, the killing is reduced to manslaughter if it occurs as soon as the fact of adultery is discovered. Pickens v. State, 31 Tex. Cr. R. 554, 21 S. W. 362. Where a husband killed his wife in a passion, because, to vex and insult him, she told him he was not the father of her children, this was held not to be sufficient provocation. Fry v. State, 81 Ga. 645, 8 S. E. 308. See, also, ante, p. 165, note 22.

[28] Lord Morly's Case, J. Kelyng, 53; State v. Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799; People v. Butler, 8 Cal. 435; People v. Murback, 64 Cal. 369, 30 Pac. 608; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Lane v. State, 85 Ala. 11, 4 South. 730; Friederich v. People, 147 Ill. 310, 35 N. E. 472; State v. Hockett, 70 Iowa, 442, 30 N. W. 742; State v. Elliott, 90 Mo. 350, 2 S. W. 411; State v. Sansone, 116 Mo. 1, 22 S. W. 617; State v. Berkley, 109 Mo. 665, 19 S. W. 192; Ex parte Sloane, 95 Ala. 22, 11 South. 14; People v. Olsen, 4 Utah, 413, 11 Pac. 577. Defamatory newspaper article not sufficient provocation. State v. Elliott (Ohio Com. Pl.) 26 Wkly. Law Bul. 116.

[29] State v. Hoyt, 13 Minn. 132 (Gil. 125); State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200; Sellers v. State, 99 Ga. 689, 26 S. E. 484, 59 Am. St. Rep. 253. See, also, ante, p. 172.

[30] State v. Berkley, 109 Mo. 665, 19 S. W. 192.

[31] Norman v. State, 26 Tex. App. 221, 9 S. W. 606. What are insults, Simmons v. State, 23 Tex. App. 653, 5 S. W. 208; Granger v. State, 24 Tex. App. 45, 5 S. W. 648. Insult to one's affianced wife, Lane v. State, 29 Tex. App. 310, 15 S. W. 827. The killing in such case must be the result of passion caused by the insult, Norman v. State, 26 Tex. App. 221, 9 S. W. 606; and must occur as soon as the words are uttered, or at the first meeting after being informed of the insult, Ex parte Jones, 31 Tex. Cr. R. 422, 20 S. W. 983; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421.

cases the mode of resentment must bear a reasonable proportion to the provocation. A homicide is not reduced to manslaughter where a deadly weapon is used, unless the provocation was extreme.[32]

Distinguished from Self-Defense.

Manslaughter resulting from provocation must not be confounded with homicide in self-defense. In the latter the blow is excused, because necessary to save the life of the person striking it, or to prevent grievous bodily harm; while in manslaughter there is no such necessity, and the blow is only partially excused, because given in the heat of passion.

INVOLUNTARY MANSLAUGHTER.

76. Involuntary manslaughter is homicide unintentionally caused,[1]

(a) In the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or

(b) By culpable negligence

(1) In performing a lawful act, or

(2) In performing an act required by law.

Unlawful Act.

Manslaughter while engaged in an unlawful act is distinguished from excusable homicide by accident, by the fact that in manslaughter the act is unlawful; and it is distinguished from murder by killing another in committing another felony, or inflicting bodily injury likely to cause death,

37 Am. St. Rep. 811; Pitts v. State, 29 Tex. App. 374, 16 S. W. 189; Howard v. State, 23 Tex. App. 265, 5 S. W. 231; Orman v. State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662; Melton v. State, 24 Tex. App. 47, 5 S. W. 652; Williams v. State, 24 Tex. App. 637, 7 S. W. 333.

[32] Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; State v. Hoyt, 13 Minn. 132 (Gil. 125).

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by the fact that in manslaughter the unlawful act does not amount to a felony, and is not likely to cause death.[2] It must also be distinguished from murder in perpetrating a reckless or wanton act endangering the life of another. The act must be malum in se, and not merely malum prohibitum. To run over a person while driving at a speed prohibited by a city ordinance, but not furiously or recklessly, would not render one guilty of manslaughter, as the excessive speed is wrong only because it is prohibited by the ordinance, and is not malum in se.[3] A prize fighter or other person voluntarily engaged in mutual combat, if he unintentionally kills his adversary, is guilty of manslaughter, because fighting is wrong and unlawful in itself. He must, however, be willingly fighting. The law permits a man to defend himself against an assault, and to defend his property, so long as he does not carry the defense so far as to endanger his assailant's life, or to inflict grievous bodily harm; and if, while keeping within proper limits, he accidentally kills his assailant, he is excused on the ground of accident.[4] He is not in such case engaged in doing an unlawful act. The law allows persons to engage in lawful athletic sports, such as football, sparring, and wrestling; and, if a participant is accidentally killed, the homicide is excusable.[5] If an act is so unlawful as to amount to an assault, a killing caused thereby will amount to manslaughter at least, and under some circumstances it may amount to murder.[6] Suicide is at least malum in se, even where it

[2] See Fray's Case, 1 East, P. C. 236.

[3] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362. And see Estell v. State, 51 N. J. Law, 182, 17 Atl. 118; ante, p. 177.

[4] Reg. v. Knock, 14 Cox, Cr. Cas. 1.

[5] Reg. v. Bradshaw, 14 Cox, Cr. Cas. 83; Reg. v. Knock, 14 Cox, Cr. Cas. 1.

[6] People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883.

is not regarded as a crime, and to kill another in an attempt to commit suicide would be manslaughter at least.[7] In those jurisdictions where suicide is still regarded as a felony, as it has always been regarded at common law, to kill another in an attempt to commit suicide is murder.[8] To assault a person being an unlawful act, it has been held that a man who strikes a woman while she is nursing an infant, and frightens the infant, so as to cause its death, is guilty of manslaughter, provided, of course, it is shown that the death of the infant was caused by the fright.[9] A parent may moderately punish his child, but, if he punishes it immoderately, he commits an unlawful act,—an assault,—and, if death is caused, he is guilty of manslaughter.[10] If a deadly weapon is used, or immoderate correction likely to cause death is willfully inflicted, the crime is murder.[11] To commit an abortion is a misdemeanor at common law, and to procure a miscarriage where the child has not quickened in the womb is at least wrong per se, if not a crime; and therefore, if the mother is killed, the homicide is manslaughter. In some states the homicide is expressly declared manslaughter by the statute.[12] So, also, where a drug is administered to a female for unlawful purposes, and she dies there-

[7] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.

[8] Ante, p. 192, footnote 17.

[9] Reg. v. Towers, 12 Cox, Cr. Cas. 530.

[10] 1 East, P. C. 261; Powell v. State, 67 Miss. 119, 6 South. 646. See, also, ante, p. 176, footnote 4; post, p. 239.

[11] Grey's Case, J. Kelyng, 64; Powell v. State, 67 Miss. 119, 6 South. 646; ante, p. 190.

[12] People v. Olmstead, 30 Mich. 431; Yundt v. People, 65 Ill. 372; Willey v. State, 46 Ind. 363; Peoples v. Com., 87 Ky. 487, 9 S. W. 509, 810; State v. Fitzporter, 93 Mo. 390, 6 S. W. 223. For the cases in which the crime is held to be murder, see ante, p. 206, note 12.

from, the killing is manslaughter.[13] In all cases the death must be sufficiently connected with the unlawful act in the relation of cause and effect.[14] Thus, it has been held that if an officer fires his pistol at persons who are resisting arrest and attacking him, and accidentally kills a bystander, the persons so resisting, though engaged in an unlawful act, are not guilty of the homicide.[15]

Negligence.

If a person, in doing a lawful act, culpably neglects to take precautions to prevent injury, and, by reason of such neglect, another is killed, he is guilty of involuntary manslaughter. Such is the case where a workman, without looking, throws stones or other material from a building into a street along which persons are likely to pass, and causes the death of a passer-by. If he knows that persons are passing, the act is wanton, so as to supply malice, and he is guilty of murder. If it is at a place where there is no reason to suppose people may be passing, the homicide is excusable.[16] A person who turns out a vicious animal where it may do harm is guilty of manslaughter if it attacks and kills a person.[17] A person who causes another's death by the negligent use of a pistol or gun, where the negligence

[13] State v. Center, 35 Vt. 378.

[14] Reg. v. Towers, 12 Cox, Cr. Cas. 530; Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; Estell v. State, 51 N. J. Law, 182, 17 Atl. 118. One who knocks another down with his fist is not liable for his death from being run over by a horse. People v. Rockwell, 39 Mich. 503. See, also, ante, p. 190.

[15] Butler v. People, 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211, 8 Am. St. Rep. 423.

[16] Rex v. Hull, Kel. J. 40.

[17] Reg. v. Dant, 10 Cox, Cr. Cas. 102.

is not so wanton as to make the killing murder,[18] or who causes death by negligently leaving powder or poison where it may endanger life, or by reckless driving,[19] or a physician or other person who causes death by gross negligence in treating disease or performing an operation,[20] is guilty of manslaughter. So, also, ignorance or negligence may render the engineer of a railroad train or steamboat guilty of manslaughter, where death is caused thereby.[21] As has already been stated in another connection, if a person, acting in self-defense against an assault, negligently comes to

[18] People v. Fuller, 2 Parker, Cr. R. (N. Y.) 16; Reg. v. Salmon, 14 Cox, Cr. Cas. 494, 6 Q. B. Div. 79; Rex v. Rampton, Kel. J. 40; State v. Vance, 17 Iowa, 138; State v. Hardie, 47 Iowa, 647, 26 Am. Rep. 496; Sparks v. Com., 3 Bush (Ky.) 111, 96 Am. Dec. 196; Murphy v. Com. (Ky.) 22 S. W. 649; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; Com. v. McLaughlin, 5 Allen (Mass.) 507; State v. Morrison, 104 Mo. 638, 16 S. W. 492; People v. Slack, 90 Mich. 448, 51 N. W. 533; Com. v. Matthews, 89 Ky. 287, 12 S. W. 333; State v. Emery, 78 Mo. 77, 47 Am. Rep. 92; State v. Vines, 93 N. C. 493, 53 Am. Rep. 466; Studstill v. State, 7 Ga. 2; State v. Roane, 13 N. C. 58; Collier v. State, 39 Ga. 31, 99 Am. Dec. 449; Robertson v. State, 2 Lea (Tenn.) 239, 31 Am. Rep. 602.

[19] Rex v. Grout, 6 Car. & P. 629; Rex v. Knight, 1 Lewin, Cr. Cas. 168; Reg. v. Dalloway, 2 Cox, Cr. Cas. 273; Lee v. State, 1 Cold. (Tenn.) 62; Belk v. People, 125 Ill. 584, 17 N. E. 744.

[20] Reg. v. Chamberlain, 10 Cox, Cr. Cas. 486; State v. Reynolds, 42 Kan. 320, 22 Pac. 410, 16 Am. St. Rep. 483; Com. v. Thompson, 6 Mass. 134; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264; Rice v. State, 8 Mo. 561; State v. Schulz, 55 Iowa, 628, 8 N. W. 469, 39 Am. Rep. 187. For a review of the cases on this point, see 1 Ben. & H. Lead. Cas. 55-59.

[21] U. S. v. Taylor, 5 McLean, 242, Fed. Cas. No. 16,441; U. S. v. Farnham, 2 Blatchf. 528, Fed. Cas. No. 15,071; U. S. v. Keller (C. C.) 19 Fed. 633; State v. Dorsey, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111; Com. v. Cook (Pa. Quart. Sess.) 8 Pa. Co. Ct. R. 486. Brakeman not liable under Texas statute, Anderson v. State, 27 Tex. App. 117, 11 S. W. 33, 3 L. R. A. 644, 11 Am. St. Rep. 189.

the erroneous conclusion that his life is in imminent danger, and kills his assailant, he is guilty of manslaughter, and the homicide is not excused on the ground of self-defense, as would be the case were he not guilty of negligence.[22]

Same—Failure to Perform Legal Duty.

If the law requires a person to do an act, and he culpably neglects his duty, so as to cause the death of another, he is guilty of involuntary manslaughter. Thus, a parent is required to furnish food and medical attendance to a child who is dependent upon him, if he is able to do so; and if he neglects this duty, and the child dies, he is guilty of manslaughter.[23] Of course, if he willfully and maliciously fails to furnish such support, he is guilty of murder. So, also, if a person fails to furnish food and medicine to a sick person under his charge and care,[24] or exposes one whom he is bound to protect to the weather,[25] and thereby causes his death, he is guilty of manslaughter. A railroad employé charged with the duty of signaling trains or managing switches, or of warning persons at railroad crossings of the approach of trains, is charged with a legal duty, and may be

[22] Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282; U. S. v. Heath (D. C.) 19 Wash. Law Rep. 818.

[23] Reg. v. Friend, Russ. & R. 20; Reg. v. Conde, 10 Cox, Cr. Cas. 547; Rex v. Nichols, 13 Cox, Cr. Cas. 75; Reg. v. Bubb, 4 Cox, Cr. Cas. 455; Reg. v. Morley, 8 Q. B. Div. 571; Reg. v. Downes, 13 Cox, Cr. Cas. 111.

[24] Self's Case, 1 East, P. C. 226; Reg. v. Instan, 1 Q. B. Div. 450. Where a person having custody of a child fails, by reason of religious belief, to furnish medical aid, and its death is thereby caused or accelerated, he is guilty of manslaughter. Reg. v. Senior [1899] 1 Q. B. 283, 19 Cox, Cr. Cas. 219.

[25] Territory v. Manton, 8 Mont. 95, 19 Pac. 387; State v. Hoit, 23 N. H. 355; State v. Smith, 65 Me. 257.

guilty of manslaughter if he neglects to perform it, and a death results.[26] So, also, an employé in a mine, charged with the duty of ventilating it so as to protect his fellow servants from deadly gases, or an employé charged with the duty of managing the appliances in a mine, is guilty of manslaughter if he neglects his duty, and thereby causes the death of a fellow servant.[27] In all cases, however, there must be a legal, as distinguished from a moral, duty to act. Notwithstanding the statements in some of the books that Christianity is a part of our common law, the law does not punish the neglect of a mere moral duty.[28] The Bible teaches us to feed the hungry, to clothe the naked, and to take in strangers and warm them; but the law does not punish a man for failure to take in a starving waif, and feed and clothe him, even though he may know that if the child is left exposed to the weather, and not fed, he will freeze or starve to death; and, indeed, he would not be punished should he for some reason even wish such result. A person who is under no legal duty to render care and attention to another, whatever may be his moral duty, is not guilty of manslaughter if death is the result of his neglect.[29]

Contributory Negligence.

Where the culpably negligent acts of two or more persons concur in causing another's death, all of them are guilty.[30] There are some cases which hold that on a prosecution for manslaughter by negligence, as, for instance, by

[26] State v. O'Brien, 32 N. J. Law, 169.

[27] Reg. v. Haines, 2 Car. & K. 368; Reg. v. Lowe, 3 Car. & K. 123, 4 Cox, Cr. Cas. 449; Reg. v. Hughes, 7 Cox, Cr. Cas. 301.

[28] Ante, p. 22.

[29] Reg. v. Smith, 2 Car. & P. 447; Reg. v. Shepherd, 9 Cox, Cr. Cas. 123. And see Thomas v. People, 2 Colo. App. 513, 31 Pac. 349.

[30] Reg. v. Swindall, 2 Car. & K. 230; Com. v. Cook (Pa. Quart. Sess.) 8 Pa. Co. Ct. R. 486; Belk v. People, 125 Ill. 584, 17 N. E. 744.

careless driving, contributory negligence on the part of the deceased is a good defense, it being said in one case that a person will not be held criminally liable for negligence, where he would not be held liable therefor in an action,[31] but the weight of authority is to the effect that contributory negligence is no defense.[32]

Principals and Accessaries.

It is not certain that there can be accomplices in manslaughter. It has been said that there cannot.[33] There certainly could not be an accessary before the fact to manslaughter by negligence, nor to manslaughter in the heat of passion caused by provocation; since, to constitute one an accessary, he must be absent when the act is committed, and there must, in the nature of things, be some premeditation, and both absence and premeditation are inconsistent with manslaughter so committed. There seems no good reason, however, why there might not be accessaries before the fact to manslaughter in doing an unlawful act. A prize fighter is guilty of manslaughter if he unintentionally kills his adversary. Why should not all those who advised and abetted the fight be held liable as accessaries? There may be principals in the second degree to manslaughter. Thus, it has been held that a man who, without any predetermined purpose, but under the influence of a momentary excitement, aids and abets his friend in an affray, is not guilty of murder if his friend kills his adversary, but is liable as an aider and abetter for the manslaughter.[34]

[31] Reg. v. Birchall, 4 Fost. & F. 1087.

[32] Reg. v. Kew, 12 Cox, Cr. Cas. 355; Reg. v. Longbottom, 3 Cox, Cr. Cas. 439.

[33] Bowman v. State (Tex. Cr. App.) 20 S. W. 558.

[34] State v. Coleman, 5 Port. (Ala.) 32. See, also, Hagan v. State, 10 Ohio St. 459; Goins v. State, 46 Ohio St. 457, 21 N. E. 476; Woolweaver v. State, 50 Ohio St. 277, 34 N. E. 352, 40 Am. St. Rep. 667. See People v. Holmes, 118 Cal. 444, 50 Pac. 675.

Statutory Degrees of Manslaughter.

In some of the states manslaughter, like murder, has been by statute divided into degrees. The student should consult the statute of his state. If he understands murder and manslaughter at common law, he will have no difficulty in understanding the statute.

CHAPTER IX.

OFFENSES AGAINST THE PERSON (Continued).

MAYHEM.

77. Mayhem, at common law, is a hurt of any part of a man's body, whereby he is rendered less able, in fighting, either to defend himself or annoy his adversary.[1] By statute it is extended so as to cover injuries merely disfiguring.

78. Mayhem is a felony in some jurisdictions, and a misdemeanor only in others.

At common law the injury must be such as renders the victim less able physically to fight, or to defend himself in a fight. If the injury merely disfigures him, without impairing his corporal abilities, it is not mayhem. Thus, it is mayhem at common law to put out a man's eye,[2] to cut off his hand or his foot or finger, or even to knock out a front tooth, as these are members which he may use in fighting; but it is otherwise where the ear or nose is cut off, or a back tooth knocked out, as these injuries merely disfigure him.[3] Statutes, however, have been passed in most of the

§§ 77–78. [1] 1 East, P. C. 393; 4 Bl. Comm. 205.

[2] Chick v. State, 7 Humph. (Tenn.) 161.

[3] A count charging malicious biting of ear with intent to maim cannot be supported as to the intent charged, as biting an ear is not

states making it mayhem to maliciously disfigure a person; as, for instance, by cutting off an ear or part of an ear.[4] Under the statutes in some of the states a specific intent to disfigure is an essential element of the crime,[5] while in others no specific intent is necessary.[6] Mayhem is not justifiable or excusable because it was inflicted in a sudden fight. It is only excused where it is necessarily inflicted on an assail-

mayhem. State v. Johnson, 58 Ohio St. 417, 51 N. E. 40, 65 Am. St. Rep. 769.

[4] Foster v. People, 50 N. Y. 598; Godfrey v. People, 63 N. Y. 207; Riflemaker v. State, 25 Ohio St. 395; State v. Brown, 60 Mo. 141; Eskridge v. State, 25 Ala. 30; Com. v. Hawkins, 11 Bush (Ky.) 603. Throwing corrosive fluid into another's eyes, State v. Baker, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414. Injuring private parts of woman, with intent to disfigure, is mayhem under statute. Kitchens v. State, 80 Ga. 810, 7 S. E. 209. Kicking person while his thumb is in another's mouth, causing it to be torn off, Bowers v. State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901. Knocking out front tooth, High v. State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488. Biting piece out of lip, State v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895. Biting off ear, People v. Wright, 93 Cal. 564, 29 Pac. 240; State v. Green, 29 N. C. 39; State v. Abram, 10 Ala. 928. If the member is replaced and grows again, the injury is nevertheless mayhem. Slatterly v. State, 41 Tex. 619.

[5] State v. Jones, 70 Iowa, 505, 30 N. W. 750; State v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895. Intent presumed if means used were such as would result in maiming. Davis v. State, 22 Tex. App. 45, 2 S. W. 630. Intent presumed from act of maiming. State v. Evans, 2 N. C. 281; State v. Hair, 37 Minn. 351, 34 N. W. 893; U. S. v. Gunther, 5 Dak. 234, 38 N. W. 79; People v. Wright, 93 Cal. 564, 29 Pac. 240; State v. Simmons, 3 Ala. 497; State v. Girkin, 23 N. C. 121. Premeditation necessary in New York. Godfrey v. People, 63 N. Y. 207. Intent need not exist any length of time. Godfrey v. People, 63 N. Y. 207; Molette v. State, 49 Ala. 18; Slatterly v. State, 41 Tex. 619.

[6] Terrell v. State, 86 Tenn. 523, 8 S. W. 212; People v. Wright, 93 Cal. 564, 29 Pac. 240.

ant to prevent grievous bodily harm or death.[7] Some of the states have statutes punishing the infliction of wounds less than mayhem.[8] It is said by Wharton that mayhem is a felony at common law, because anciently the offender had judgment for the loss of the same member as that the loss of which he occasioned to the sufferer.[9] It is not a felony at common law in Massachusetts, nor in Georgia, except in case of castration.[10]

RAPE.

79. Rape is the act of a man having unlawful carnal knowledge of a woman without her conscious and voluntary permission, [1]—as in the following cases:

(a) Where her resistance is overcome by actual force.

(b) Where no actual force is used, but because of her condition, known to the man, she cannot consciously consent.

(c) Where she is below the age, at common law or under statutes, at which she can consent.

(d) Where her consent is extorted by fear of immediate bodily harm.

(e) Where (according to some authorities) her submission is induced by fraud without her intelligent consent; as, where induced by fraud she submits to connection believed to be a surgical operation, or to connection with a man fraudulently impersonating and believed to be her husband.

80. Rape is a felony at common law and under the statutes.

Rape is generally defined as the act of having unlawful carnal knowledge of a woman by force and against her

[7] People v. Wright, 93 Cal. 564, 29 Pac. 240; State v. Evans, 2 N. C. 281; State v. Crawford, 13 N. C. 425.

[8] State v. Watson, 41 La. Ann. 598, 7 South. 125.

[9] 1 Whart. Cr. Law, § 583. And see 2 Bish. Cr. Law, § 1008.

[10] Com. v. Newell, 7 Mass. 244; Adams v. Barratt, 5 Ga. 404. And see Canada v. Com., 22 Grat. (Va.) 899; State v. Thompson, 30 Mo. 470; State v. Brown, 60 Mo. 141.

§§ 79–80. [1] Whart. Cr. Law, § 550.

will;[2] but, as we shall see, the definition is defective in not being more definite as to the necessity for force, and the effect of consent on the part of the woman. Force on the part of the man, and want of consent on the part of the woman, are in a sense essential elements of the crime of rape, but the force may be supplied by what is not force at all, and the woman may, under some circumstances, actually consent. Even where such is the case, however, there is force in law, and there is want of consent in law. As was said in an English case, "the word 'forcibly' does not necessarily mean 'violently,' but with that description of force which must be exercised in order to accomplish the act."[3]

Consent—Actual Force.

The force must be such as to overcome resistance. If a woman is capable in the eye of the law of consenting to sexual intercourse, carnal knowledge of her with her consent is not rape, provided, however, as we shall presently see, her consent is not extorted by threats and fear of immediate bodily harm.[4] Under such circumstances, to constitute the crime of rape, she must resist to the uttermost.[5]

[2] 1 East, P. C. 434; 4 Bl. Comm. 210.

[3] Per May, C. J., Reg. v. Dee, L. R. 14 Ir., at page 476.

[4] Reg. v. Hallett, 9 Car. & P. 748.

[5] Oleson v. State, 11 Neb. 276, 9 N. W. 38, 38 Am. St. Rep. 366; State v. Burgdorf, 53 Mo. 65; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Conners v. State, 47 Wis. 523, 2 N. W. 1143; Strang v. People, 24 Mich. 1; Whittaker v. State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856; People v. Morrison, 1 Parker, Cr. R. (N. Y.) 625; Whitney v. State, 35 Ind. 506; Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Taylor v. State, 50 Ga. 79; People v. Brown, 47 Cal. 447; O'Boyle v. State, 100 Wis. 296, 75 N. W. 989. The circumstances may show that no force was used; as, for instance, where a girl of 15, weighing 150 pounds, claims that she was raped by a boy weigh-

Many cases lay down the rule without qualification.[6] The importance of resistance, however, is to show two elements of the crime,—carnal knowledge by force, and nonconsent. The test of resistance to the limit of physical capacity is difficult, if not impossible, to apply; and it seems that if the resistance, although short of the extreme limit of which the woman is physically capable, is of such a character as clearly to show nonconsent, and is persisted in to the end, the requirement is satisfied.[7] Where there is no resistance from incapacity, the mere force of penetration is sufficient. Opposition by mere words is not enough.[8] If she voluntarily gives her consent to the act, it is immaterial how tardily it is given or how much force has previously been employed.[9]

ing 115 pounds, while she was sitting on the top step of a steep stairway. Brown v. Com., 82 Va. 653. Failure to make outcry not alone enough to show want of resistance. Eberhart v. State, 134 Ind. 651, 34 N. E. 637; and see other cases cited.

[6] People v. Dohring, supra.

[7] "The importance of resistance is simply to show two elements of the crime,—carnal knowledge by force * * * and nonconsent. * * * The jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the use of brutal force. So far resistance by the complainant is important and necessary; but to make the crime hinge on the uttermost exertion the woman was physically capable of making would be a reproach to the law as well as to common sense. * * * The fallacy lies in the assumption that the deficiency in such cases necessarily shows consent. If the failure to make extreme resistance was intentional, in order that the assailant might accomplish his purpose, it would show consent; but without such intent it shows nothing important whatever. The whole question is one of fact." State v. Shields, 45 Conn. 256; State v. Sudduth, 52 S. C. 488, 30 S. E. 408.

[8] Huber v. State, 126 Ind. 185, 25 N. E. 904.

[9] Reynolds v. State, 27 Neb. 90, 42 N. W 903, 20 Am. St. Rep. 659; Mathews v. State, 101 Ga. 547, 29 S. E. 424.

If rape is committed, subsequent condonation on the part of the woman is no defense.[10]

Same — Woman Incapable of Consent.

In order that the woman's consent may prevent the act from being rape, it must be consciously given. The consent must be the act of the woman as a rational and intelligent being. It must proceed from the will, not when the will is acting without the control of reason, but from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being.[11] There is no consent in law if a woman is so drunk that she does not know what she is doing, and a man takes advantage of her unconscious condition to have carnal knowledge of her. Under such circumstances, he is regarded as accomplishing the act by force, and without her consent.[12] So, also, where the woman is insane or imbecile or asleep, the crime is rape,[13] but not where she is merely weak-minded, and has sufficient mental capacity to know what she is doing.[14] In these cases, however, the man must know the condition of the woman, and take advantage of it to carnally know her. The mere fact that her mental powers are so impaired that she is unconscious of the nature of the act will not make the act rape,

[10] State v. Newcomer, 59 Kan. 668, 54 Pac. 685. Ante, p. 9, note 27.

[11] Reg. v. Dee, L. R. 14 Ir., at page 487.

[12] Reg. v. Champlin, 1 Car. & K. 749; Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531. But see People v. Quin, 50 Barb. (N. Y.) 128. Cantharides cannot overcome woman's mental or physical power to resist. State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

[13] Reg. v. Fletcher, 8 Cox, Cr. Cas. 131; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Cunningham, 100 Mo. Sup. 382, 12 S. W. 376. Contra, Crosswell v. People, 13 Mich. 427, 87 Am. Dec. 774 (woman insane, but not idiot); Charles v. State, 11 Ark. 389; Com. v. Fields, 4 Leigh (Va.) 648.

[14] McQuirk v. State, 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381.

if the man does not know her condition, and believes she is willingly submitting.[15] At common law, a child under the age of 10 years is deemed incapable of consenting, as she cannot know the nature of the act, and her consent is therefore no defense.[16] It has even been held that a girl of 12 is incapable of consenting at common law.[17] In most of the states there are statutes which fix an age below which a girl cannot consent to sexual intercourse, by providing that carnal knowledge of a female under that age shall be rape, whether she consents or not. Here, of course, consent is no defense.[18] In some states the age is fixed as high as 18 years.

Same—Fear.

If a woman's consent to carnal intercourse is obtained by threats and fear of immediate bodily harm, the intimidation vitiates her consent, and supplies the place of force, and the act is rape.[19] Her consent must be voluntarily given. As said in a Michigan case, force is an essential element of the

[15] Crosswell v. People, 13 Mich. 427, 87 Am. Dec. 741.

[16] People v. McDonald, 9 Mich. 150; Crosswell v. People, 13 Mich. 433, 87 Am. Dec. 774; Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747.

[17] Coates v. State, 50 Ark. 330, 7 S. W. 304; State v. Tilman, 30 La. Ann. 1249, 31 Am. Rep. 236; State v. Miller, 42 La. Ann. 1186, 8 South. 309, 21 Am. St. Rep. 418.

[18] Com. v. Roosnell, 143 Mass. 32, 8 N. E. 747; Farrell v. State, 54 N. J. Law, 416, 24 Atl. 723; People v. Courier, 79 Mich. 366, 44 N. W. 571; People v. Goulette, 82 Mich. 36, 45 N. W. 1124; Proper v. State, 85 Wis. 615, 55 N. W. 1035; State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; State v. Lacey, 111 Mo. 513, 20 S. W. 238; State v. Wright, 25 Neb. 38, 40 N. W. 596; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Rodgers v. State, 30 Tex. App. 510, 17 S. W. 1077; Comer v. State (Tex. Cr. App.) 20 S. W. 547; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496.

[19] Reg. v. Woodhurst, 12 Cox, Cr. Cas. 443; Strang v. People, 24 Mich. 1; State v. Ward, 73 Iowa, 532, 35 N. W. 617; State v.

crime of rape, and the force contemplated is something more than that which is always essential to sexual intercourse when consented to. It is not limited, however, to the positive exertion of physical force in compelling submission, but includes any force or violence threatened as the result of noncompliance, and for the purpose of preventing resistance or extorting consent, and sufficient to create a real apprehension of dangerous consequences, or great bodily harm, or in any manner to overpower the mind of the victim so that she dare not resist.[20]

Same—Fraud.

It is generally declared to be the rule that consent on the part of the woman, if voluntarily given, is a defense, except where she is in law deemed incapable of consenting, even though it was obtained by fraud.[21] Nevertheless, upon the question how far submission procured by fraud is a defense, there is much conflict of authority. Thus, it has been held that, where a woman consents to intercourse with a man under the belief on his representations that an illegal marriage to him is legal, the man is not guilty of rape.[22] On the other hand, it has been held in some cases that a man commits rape if he fraudulently personates a woman's husband, and she submits to sexual intercourse believing that he is her husband, on the ground that there is no intelligent consent, the actual consent being to a connection with a different person; and there appears to be valid ground

Cunningham, 100 Mo. 382, 12 S. W. 376; Turner v. People, 33 Mich. 363; Huston v. People, 121 Ill. 497, 13 N. E. 538.

[20] Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283.

[21] Whittaker v. State, 50 Wis. 519, 7 N. W. 431, 36 Am. Rep. 856; Walter v. People, 50 Barb. (N. Y.) 144; People v. Royal, 53 Cal. 62; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283.

[22] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

for the distinction.[23] The preponderance of authority is, however, to the contrary.[24] In some of the states carnal knowledge of a woman by personation of her husband is made rape by statute.[25] It has also been held rape for a physician to have carnal knowledge of a girl by fraudulently inducing her to believe that she is submitting to a surgical operation, on the ground that consent to an act of a wholly different character is not consent to sexual connection;[26] but there are authorities to the contrary.[27]

The Act.

It is necessary to prove some penetration by the male organ, but the slightest penetration is sufficient, and it may be inferred from the circumstances.[28] There are authorities

[23] Reg. v. Dee, 15 Cox, Cr. Cas. 579. See, also, State v. Shepard, 7 Conn. 54; Whart. Cr. Law, § 561.

[24] Reg. v. Barrow, L. R. 1 Cr. Cas. 156; Reg. v. Fletcher, 10 Cox, Cr. Cas. 248; Reg. v. Saunders, 8 Car. & P. 265; Wyatt v. State, 2 Swan (Tenn.) 394; Rex v. Jackson, Russ. & R. 486; Reg. v. Clarke, 6 Cox, Cr. Cas. 412; Lewis v. State, 30 Ala. 54, 68 Am. Dec. 113; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283; State v. Brooks, 76 N. C. 1.

[25] Mooney v. State, 29 Tex. App. 257, 15 S. W. 724; King v. State, 22 Tex. App. 650, 3 S. W. 342; Payne v. State, 38 Tex. Cr. R. 494, 43 S. W. 515, 70 Am. St. Rep. 757.

[26] Reg. v. Flattery, 13 Cox, Cr. Cas. 388; Reg. v. Stanton, 1 Car. & K. 415; Pomeroy v. State, 94 Ind. 96, 48 Am. Rep. 146. And see dictum to same effect, Crosswell v. People, 13 Mich. 427, 87 Am. Dec. 774; Eberhart v. State, 134 Ind. 654, 34 N. E. 637; State v. Nash, 109 N. C. 824, 13 S. E. 874.

[27] Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283. It is otherwise if the physician threatens and inspires fear of treatment likely to endanger life, and thereby obtains her consent. Id.

[28] Rex v. Gammon, 5 Car. & P. 321; Davis v. State, 42 Tex. 226; State v. Shields, 45 Conn. 256; Hardtke v. State, 67 Wis. 552, 30 N. W. 723; Taylor v. State, 111 Ind. 279, 12 N. E. 400; State v. De-

to the effect that proof of emission was necessary at common law,[29] but such is not the law, and in most of the states there are statutes making proof of emission unnecessary.[30]

The Woman.

The fact that the woman is a common prostitute, or the man's mistress, does not make the act any the less rape, if force, actual or constructive, is used; for the carnal knowledge is unlawful, and forcible unlawful carnal knowledge of any woman is rape.[31] The fact, however, that the woman was a prostitute, or of unchaste character, may always be considered in determining whether she consented or not, as a prostitute would be more apt to consent than a chaste woman.[32] The intercourse must be unlawful. It is lawful for a husband to have carnal knowledge of his wife, and the fact that he uses force does not make him guilty of rape. He may, however, become guilty by aiding or counseling another to rape his wife, for he would then be a principal in the second degree or accessary before the fact to the other's

poister, 21 Nev. 107, 25 Pac. 1000; State v. Dalton, 106 Mo. 463, 17 S. W. 700; Rodgers v. State, 30 Tex. App. 510, 17 S. W. 1077; People v. Courier, 79 Mich. 366, 44 N. W. 571; Ellis v. State, 25 Fla. 702, 6 South. 768; Bean v. People, 124 Ill. 576, 16 N. E. 656; Waller v. State, 40 Ala. 325; State v. Grubb, 55 Kan. 678, 41 Pac. 951.

[29] 1 Hale, P. C. 628; 1 Hawk. P. C. c. 41, § 1; 1 East, P. C. 437, 438.

[30] Ellis v. State, 25 Fla. 702, 6 South. 768; Blackburn v. State, 22 Ohio St. 102; State v. Hargrave, 65 N. C. 466; Waller v. State, 40 Ala. 325; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536.

[31] People v. Crego, 70 Mich. 319, 38 N. W. 281; Carney v. State, 118 Ind. 525, 21 N. E. 48; Pugh v. Com. (Ky.) 7 S. W. 541.

[32] State v. Reed, 39 Vt. 417, 94 Am. Dec. 337; People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; Woods v. People, 55 N. Y. 515, 14 Am. Rep. 309; McQuirk v. State, 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381.

crime.[33] The crime may be committed on a girl under the age of puberty.[34]

Who may Commit.

We have just seen that a husband cannot commit a rape on his wife, but that he may be an accessary or a principal in the second degree. So, also, a woman, though it would be impossible for her to commit the crime herself, may be guilty as principal in the second degree or accessary, by aiding, abetting, or counseling a man in its commission.[35] A boy under fourteen is under the common law of England conclusively presumed incapable physically of committing the crime.[36] Such is also the law with us in some of the states.[37] Some courts, on the contrary, hold that the common-law rule is not applicable, and refuse to follow it, on the ground that, because of the difference in climate and other conditions, boys mature earlier in this country than in England.[38] Other courts hold that the common-law rule applies so far as it raises a presumption of incapacity, but that the presumption is not conclusive, and may be rebutted.[39] A boy under fourteen, if of sufficient mental capacity,

[33] Strang v. People, 24 Mich. 13; People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; State v. Dowell, 106 N. C. 722, 11 S. E. 525, 8 L. R. A. 297, 19 Am. St. Rep. 568.

[34] 1 Hale, P. C. 830.

[35] State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; Kessler v. Com., 12 Bush (Ky.) 18. See, also, State v. Hairston, 121 N. C. 579, 28 S. E. 492.

[36] Reg. v. Phillips, 8 Car. & P. 736.

[37] Com. v. Green, 2 Pick. (Mass.) 380; McKinny v. State, 29 Fla. 565, 10 South. 732, 30 Am. St. Rep. 140; Foster v. Com., 96 Va. 306, 31 S. E. 503, 42 L. R. A. 589, 70 Am. St. Rep. 846; Chism v. State (Fla.) 28 South. 399.

[38] State v. Jones, 39 La. Ann. 935, 3 South. 57.

[39] Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592; Heilman v. Com., 84 Ky. 457,

may, however, be guilty as principal or accessary to the crime committed by another.[40] We have already considered in another connection the question whether a boy who is too young to commit rape may be guilty of an attempt to commit it.[41] Impotency is probably a defense.

ASSAULT AND BATTERY.

81. An assault is an attempt, or offer, with force and violence, to do a corporal hurt to another,[1] and is either

(a) Common assault; that is, where there are no aggravating circumstances, or

(b) Aggravated assault; that is, where there are aggravating circumstances.

1 S. W. 731, 4 Am. St. Rep. 207; People v. Randolph, 2 Parker, Cr. R. (N. Y.) 174; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36; Davidson v. Com. (Ky.) 47 S. W. 213.

[40] Law v. Com., 75 Va. 885, 40 Am. Rep. 750; 1 Hale, P. C. 630.

[41] Ante, p. 135.

§§ 81–83. [1] "An assault is an unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being." 2 Bish. New Cr. Law, § 23. "An assault is an apparent attempt, by violence, to do corporal hurt to another." 1 Whart. Cr. Law, § 603. "An intentional attempt to strike within striking distance, which fails of its intended effect, either by preventive interference or by misadventure." Lane v. State, 85 Ala. 11, 4 South. 730. "An assault is an attempt or offer, with force and violence, to do a corporal hurt to another, as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim. So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault." 1 Russ. Crimes, 1019.

82. A battery is an assault whereby any force, however slight, is actually applied to the person of another, directly or indirectly.[2]

83. There must, to constitute a criminal assault, be at least an apparent present ability to commit the battery. Some courts hold an apparent present ability sufficient, while others require an actual ability.

An assault has generally been defined as an attempt, or offer, with force or violence, to do a corporal hurt to another.[3] Some authorities, on the other hand, maintain that a mere attempt does not constitute an assault, but that there must be an act of a nature to put the person assailed in reasonable fear of bodily injury.[4] If this view is correct, there is little or no distinction between a criminal and a civil assault.[5] It seems, however, that the definition of criminal assault should include attempts as well as acts of a nature to give the person assailed reasonable ground to believe that the actor means to apply physical force to his person.[6]

Regarded as an attempt, an assault is an attempt to commit a battery, and the principles of law in reference to attempts generally are applicable. In treating of attempts, we considered the necessity for an overt act, and it is not necessary to go over again what was there said. It is sufficient to say that an overt act is also essential to an as-

[2] Steph. Dig. Cr. Law, art. 241.

[3] Hawk. P. C. c. 15, § 1; 1 Russ. Crimes, 1019, note.

[4] Bish. New Cr. Law, § 23.

[5] Jagg. Torts, 431.

[6] "An assault is (a) an attempt unlawfully to apply any the least actual force to the person of another, directly or indirectly; (b) the act of using a gesture toward another, giving him reasonable grounds to believe that the person using that gesture means to apply such actual force to his person as aforesaid; (c) the act of depriving another of his liberty,—in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud." Steph. Dig. Cr. Law, art. 241.

sault, and that the force intended to be applied must be put in motion; otherwise, there is merely an intention, and not an attempt, to inflict the battery.[7] Mere preparations or mere words and threats, whatever may be the intention, can never amount to an assault; there must be some act which, if not stopped, may apparently, or, as held in some jurisdictions, actually, produce injury.[8] Though an actual touching of the person assaulted is necessary to constitute a battery, it is not necessary to constitute an assault.[9] If one raises his cane or fist at another in a threatening manner, so as to create a reasonable apprehension that he will strike, or if a person strikes or spits at another, and misses him, there is an assault.[10] It has been held in Virginia that approaching a person with menaces and gesticulations is not an assault if there is no attempt to strike;[11] but this is probably too broad a statement. It would be so if the person so approached had reason to believe there was no intention to strike him, but not otherwise; for it is very generally held that where a threatening act is done, the effect of which is to create a well-grounded apprehension of danger, and

[7] People v. Yslas, 27 Cal. 630; Smith v. State, 39 Miss. 521; State v. Davis, 23 N. C. 125, 35 Am. Dec. 735; State v. Mooney, 61 N. C. 434; Balkum v. State, 40 Ala. 671.

[8] People v. Lilley, 43 Mich. 521, 5 N. W. 982; Cutler v. State, 59 Ind. 300; Lawson v. State, 30 Ala. 14; State v. Milsaps, 82 N. C. 549; State v. Painter, 67 Mo. 84.

[9] Hays v. People, 1 Hill (N. Y.) 351.

[10] 4 Bl. Comm. 120; State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714; State v. Baker, 65 N. C. 332; U. S. v. Hand, 2 Wash. C. C. 435, Fed. Cas. No. 15,297; U. S. v. Ortega, 4 Wash. C. C. 535, Fed. Cas. No. 15,971.

[11] Berkeley v. Com., 88 Va. 1017, 14 S. E. 916. Drawing weapon with threat to use it is an assault, though it is not pointed. People v. McMakin, 8 Cal. 547; State v. Church, 63 N. C. 15.

cause the person threatened to act on the defensive or retreat, there is an assault.[12] If a person, by means of threats, is stopped and prevented from passing along a public highway, he is assaulted,[13] and it has been held in North Carolina that if a person is at a place where he has a right to be, and several other persons, armed with pitchforks and guns, by following him and using threatening and insulting language, put him in fear, and induce him to go home sooner than he would have gone, or by a different way, they are guilty of an assault, though they do not get nearer than 75 yards, and do not take the weapons from their shoulders.[14] A man may also commit an assault by threatening a battery, and offering to inflict it unless conditions named by him are complied with;[15] as, for instance, where a man, while taking off another's property, faces the owner with a cocked gun in his hand, and his finger on the trigger, but without pointing it, and says that he will kill any one who interferes, and lays hands on the property;[16] or where a man raises an axe, and tells another he will strike him if he does

[12] State v. Davis, 23 N. C. 125, 35 Am. Dec. 735; Stephens v. Myers, 4 Car. & P. 349; State v. McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607. Riding horse so near another as to endanger his person, and create a belief in an intention to ride over him, State v. Sims, 3 Strob. (S. C.) 137. Firing a revolver in the direction of another without intention to shoot him, but for the purpose of frightening him, is an assault. State v. Triplett, 52 Kan. 678, 35 Pac. 815. See, also, post, p. 234, note 45.

[13] Bloomer v. State, 3 Sneed (Tenn.) 66.

[14] State v. Rawles, 65 N. C. 334. And see State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; State v. Shipman, 81 N. C. 513; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496.

[15] Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; U. S. v. Myers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845; State v. Church, 63 N. C. 15.

[16] State v. Horne, 92 N. C. 805, 53 Am. Rep. 442.

not do a certain thing.[17] To administer poison or other injurious drugs will constitute an assault and battery, and it is immaterial that the person so assaulted takes the drug himself, where he does not know its nature; since, "although force and violence are included in all definitions of assault or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts." [18] Exposure of an unconscious child is also an assault.[19]

Battery.

Assault and battery is an offense distinct from assault.[20] As we have seen, an assault is an attempt to apply unlawful force to the person of another, or to commit a battery. The battery is the application of the force. It makes no difference how trifling the force may be, so long as it is unlawful.[21] Every touching or laying hold of the person of an-

[17] State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714. See also State v. Reavis, 113 N. C. 677, 18 S. E. 388.

[18] Com. v. Stratton, 114 Mass. 303, 20 Am. Rep. 350; Johnson v. State, 92 Ga. 36, 17 S. E. 974; Reg. v. Button, 8 Car. & P. 660 (but see Reg. v. Hanson, 2 Car. & K. 912); State v. Glover, 27 S. C. 602, 4 S. E. 564; Carr v. State, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. Rep. 408. Communicating venereal disease, Reg. v. Bennett, 4 Fost. & F. 1105; Reg. v. Sinclair, 13 Cox, Cr. Cas. 28.

[19] Reg. v. March, 1 Car. & K. 496.

[20] Moore v. People, 26 Ill. App. 137.

[21] Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410. Where a milkman, against the express commands of one of his customers, entered the latter's sleeping room in the early morning, took hold of his arms and shoulders, and used sufficient force to awaken him, for the purpose of presenting his bill, he was held guilty. Richmond v. Fiske, 160 Mass. 34, 35 N. E. 103.

other, or his clothes,[22] in an angry, revengeful, rude, insolent, or hostile manner, is a battery.[23] It is a battery to spit on another, to push him angrily out of the way, to put a dog on him which actually bites or even touches him, or to inflict injury by administering poisonous or injurious drugs.[24] To spit at a person and miss him, or to set a dog on him which does not touch him, would be an assault, but not a battery. An assault may not result in a battery, but every battery necessarily includes an assault.[25] If the force is not applied, there is an assault only; if it is applied, there is an assault and battery. It is immaterial whether that which causes the injury acts upon the person injured externally or internally, by mechanical or chemical force.[26] The force may be applied directly or indirectly. Thus, one who whips a horse, and makes him run away with the rider, or seizes the horses attached to a carriage, and turns them around, commits a battery, and consequently an assault, upon the rider or driver.[27]

Aggravated Assaults—Assaults with Specific Intent.

Aggravated assaults are those which are accompanied by circumstances of aggravation; such as assaults with intent to kill, to rape, or to inflict serious bodily injury. In such cases the assault, though only a misdemeanor, like a

[22] Reg. v. Day, 1 Cox, Cr. Cas. 207.

[23] 1 Russ. Crimes, 1020; 3 Bl. Comm. 120.

[24] 1 Russ. Crimes, 1020.

[25] Johnson v. State, 17 Tex. 515; State v. Baker, 65 N. C. 332.

[26] Com. v. Stratton, 114 Mass. 303, 20 Am. Rep. 350 (administering deleterious drug by deceit); Reg. v. Button, 8 Car. & P. 660 (Spanish flies); Carr v. State, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. Rep. 408 (poison). Contra, Reg. v. Hanson, 2 Car. & K. 912.

[27] People v. Moore, 50 Hun (N. Y.) 356, 3 N. Y. Supp. 159. See, also, Steph. Dig. Cr. Law, art. 241, note 2. Cf. Kirland v. State, 43 Ind. 146, 13 Am. Rep. 386.

common assault, and not a distinct crime, at common law,[28] is even at common law regarded as aggravated, and punished more severely where the punishment is within the discretion of the court or jury.[29] There are now in all of the states statutes making assaults with intent to commit certain specific crimes substantive offenses, distinct from common assault, and in many cases the offenses are felonies. Thus, there are statutes punishing assaults with intent to kill; assaults with a dangerous or a deadly weapon;[30] assaults

[28] Hall v. State, 9 Fla. 203, 76 Am. Dec. 617; Wilson v. People, 24 Mich. 410; Wright v. People, 33 Mich. 300; Cornelison v. Com., 84 Ky. 583, 2 S. W. 235; Jackson v. State, 49 N. J. Law, 252, 9 Atl. 740.

[29] 2 Bish. Cr. Law, §§ 42–54; Cornelison v. Com., 84 Ky. 583, 2 S. W. 235.

[30] What constitutes a deadly weapon, U. S. v. Small, 2 Curt. 241, Fed. Cas. No. 16,314; iron two-pound weight, Blige v. State, 20 Fla. 742, 51 Am. Rep. 628; gun or pistol used as instrument to strike with, Shadle v. State, 34 Tex. 572; Skidmore v. State, 43 Tex. 93; Pierce v. State, 21 Tex. App. 540, 1 S. W. 463; Jenkins v. State, 30 Tex. App. 379, 17 S. W. 938; unloaded gun, State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830; sledge hammer, Philpot v. Com., 86 Ky. 595, 6 S. W. 455; chair, Kouns v. State, 3 Tex. App. 13; stick, People v. Comstock, 49 Mich. 330, 13 N. W. 617; Stevens v. State, 27 Tex. App. 461, 11 S. W. 459; clubs, State v. Phillips, 104 N. C. 786, 10 S. E. 463; chisel, Com. v. Branham, 8 Bush (Ky.) 387; piece of timber, State v. Alfred, 44 La. Ann. 582, 10 South. 887; pocketknife, Sylvester v. State, 71 Ala. 17; State v. Scott, 39 La. Ann. 943, 3 South. 83; stone, Com. v. Duncan, 91 Ky. 592, 16 S. W. 530; fence pole, Wilson v. State, 15 Tex. App. 150; pitchfork handle, used as club, not a "sharp, dangerous" weapon, Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143; pitchfork a deadly weapon, Evans v. Com. (Ky.) 12 S. W. 767; razor, State v. Nelson, 38 La. Ann. 942, 58 Am. Rep. 202. Judicial notice that ax is deadly, Dollarhide v. U. S., Morris (Iowa) 233, 39 Am. Dec. 460; State v. Ostrander, 18 Iowa, 456; State v. Shields, 110 N. C. 497, 14 S. E. 779; contra, Gladney v. State (Tex. App.) 12 S. W. 868; Melton v. State, 30 Tex. App. 273, 17 S. W. 257; also as to loaded pistol and hoe, Hamilton v. Peo-

with intent to commit rape; assaults with intent to rob; and assaults with other intents not necessary to be specially mentioned. To constitute these crimes, the specific intent is absolutely essential. A man cannot be convicted of an assault with intent to kill unless it is shown that he intended to kill.[31] In some states it is made a crime to assault another with intent to murder, and this is an altogether different crime from assault with intent to kill.[32] Evidence that the assailant intended such killing only as would amount to manslaughter will support an indictment for assault with intent to kill,[33] or to commit manslaughter;[34] but, to support

ple, 113 Ill. 38, 55 Am. Rep. 396; and as to brickbat, People v. Fabey, 64 Cal. 342, 30 Pac. 1030. Loaded pistol and brass knuckles not necessarily deadly, Ballard v. State (Tex. App.) 13 S. W. 674. Question for jury, People v. Leyba, 74 Cal. 407, 16 Pac. 200.

[31] Intent to do bodily injury likely to cause death not enough. Carter v. State, 28 Tex. App. 355, 13 S. W. 147; Moore v. State, 26 Tex. App. 322, 9 S. W. 610. Contra, Smith v. State, 88 Ala. 23, 7 South. 103; Ex parte Brown (C. C.) 40 Fed. 81. Presenting gun within shooting distance without shooting does not warrant finding of intent to shoot or kill, but rather the reverse. Davis v. State, 25 Fla. 272, 5 South. 803. Intent inferred from shooting, State v. Elvins, 101 Mo. 243, 13 S. W. 937; State v. Dill, 9 Houst. (Del.) 495, 18 Atl. 763; or use of deadly weapon, State v. Doyle, 107 Mo. 36, 17 S. W. 751; Jackson v. State, 94 Ala. 85, 10 South. 509. Shooting at one person with intent to kill him, and hitting another, is an assault with intent to kill the latter. Post, p. 237, note 58. On this point, see, also, ante, pp. 50–58.

[32] Hall v. State, 9 Fla. 203, 76 Am. Dec. 617.

[33] Ex parte Brown (C. C.) 40 Fed. 81.

[34] State v. Connor, 59 Iowa, 357, 13 N. W. 327, 44 Am. Rep. 686; Hall v. State, 9 Fla. 203, 76 Am. Dec. 617; State v. Brady, 39 La. Ann. 687, 2 South. 556; Brown v. State, 111 Ind. 441, 12 N. E. 514; State v. Postal, 83 Iowa, 460, 50 N. W. 207; Spivey v. State, 30 Tex. App. 343, 17 S. W. 546; State v. McGuire, 87 Iowa, 142, 54 N. W. 202; State v. Stone. 88 Iowa, 724, 55 N. W. 6; State v. White, 45 Iowa, 325. Some courts hold that there cannot be an assault with

an indictment for assault with intent to murder, it must be shown that such a killing was intended as would amount to murder.[35] So, also, in case of assault with intent to commit rape, it must be shown that there was an intention to have intercourse by means that would make the act rape, and it must therefore be shown that there was an intent to overcome resistance by force, or its equivalent,[36] and to

intent to commit manslaughter. People v. Lilley, 43 Mich. 521, 5 N. W. 982. No such offense as assault with intent to commit involuntary manslaughter. Stevens v. State, 91 Tenn. 726, 20 S. W. 423.

[35] Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; State v. Butman, 42 N. H. 490; Davis v. State, 79 Ga. 767, 4 S. E. 318; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; People v. Scott, 6 Mich. 287; Wilson v. People, 24 Mich. 410; Bonfanti v. State, 2 Minn. 123 (Gil. 99). Actual intent to kill necessary. Walls v. State, 90 Ala. 618, 8 South. 680; Felker v. State, 54 Ark. 489, 16 S. W. 663. Intent may be inferred from act, Coun v. People, 116 Ill. 460, 6 N. E. 463; Crosby v. People, 137 Ill. 325, 27 N. E. 49; as in case of stabbing, Jeff's Case, 39 Miss. 593. Use of deadly weapon not necessary. Monday v. State, 32 Ga. 672, 79 Am. Dec. 314. The law does not presume intent from use of deadly weapon. Patterson v. State, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152; Gilbert v. State, 90 Ga. 691, 16 S. E. 652; Gallery v. State, 92 Ga. 463, 17 S. E. 863. As to what is sufficient to show intent, see People v. Comstock, 49 Mich. 330, 13 N. W. 617; Weaver v. People, 132 Ill. 536, 24 N. E. 571. Assault with intent to murder not necessarily committed whenever the killing, if it should result, would be murder. State v. Evans, 39 La. Ann. 912, 3 South. 63.

[36] Com. v. Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336; Milton v. State, 23 Tex. App. 204, 4 S. W. 574; Barr v. People, 113 Ill. 473; State v. Kendall, 73 Iowa, 255, 34 N. W. 843, 5 Am. St. Rep. 679; State v. Powell, 106 N. C. 635, 11 S. E. 191; Brown v. State, 27 Tex. App. 330, 11 S. W. 412; Langan v. State, 27 Tex. App. 498, 11 S. W. 521; People v. Manchego, 80 Cal. 306, 22 Pac. 223; State v. Nash, 109 N. C. 824, 13 S. E. 874; People v. Kirwan, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 160; Pefferling v. State, 40 Tex. 486. Attempt to have intercourse with woman while asleep, Maupin v. State (Ark.) 14 S. W. 924; Harvey v. State, 53 Ark. 425, 14 S. W. 645, 22 Am.

penetrate the woman's person.[37] Since force and want of consent are not necessary to constitute rape of girls under ages specified in the statutes against intercourse with girls under a certain age, whether they consent or not, it is not necessary, on prosecutions for assault with intent to rape in such case, to show an intent to use force, and it is no defense to show that the girl consented to the assault.[38] An assault being an attempt to commit a battery, it necessarily follows that an assault with intent to commit a specific kind of battery, amounting to a crime, such as murder or rape, is an attempt to commit that crime.[39] The principles of law

St. Rep. 229; State v. Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; Com. v. Fields, 4 Leigh (Va.) 648. Need not actually touch woman, Jackson v. State, 91 Ga. 322, 18 S. E. 132, 44 Am. St. Rep. 25. The fact that a man ran after a woman, calling out to her to stop, until she was within sight of a house, was held sufficient to sustain finding of intent to rape; but the case is a doubtful one, and aroused much adverse criticism at the time it was rendered. State v. Neely, 74 N. C. 425, 21 Am. Rep. 496. See State v. Massey, 86 N. C. 658, 41 Am. Rep. 478, disapproving State v. Neely. What acts sufficient to show intent to rape, State v. Boon, 35 N. C. 244, 57 Am. Dec. 555; Norris v. State, 87 Ala. 85, 6 South. 371; Skinner v. State, 28 Neb. 814, 45 N. W. 53; Com. v. Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336; Carroll v. State, 24 Tex. App. 366, 6 S. W. 190; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; State v. Daly, 16 Or. 240, 18 Pac. 357; Green v. State, 67 Miss. 356, 7 South. 326; Harvey v. State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229; Jones v. State, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850; Moore v. State, 79 Wis. 546, 48 N. W. 653; State v. Owsley, 102 Mo. 678, 15 S. W. 137; People v. Fleming, 94 Cal. 308, 29 Pac. 647; Robertson v. State, 30 Tex. App. 498, 17 S. W. 1068; State v. Chapman, 88 Iowa, 254, 55 N. W. 489. Administering cantharides does not show intent to rape. State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

[37] McGee v. State, 21 Tex. App. 670, 2 S. W. 890.

[38] Post, p. 243.

[39] Contra under statutes of Texas, California, and probably of other states. Taylor v. State, 22 Tex. App. 529, 3 S. W. 753, 58 Am

applicable to attempts are also applicable here, and the cases there cited are in point here. By statute, in Texas an assault on a female by an adult male is declared an aggravated assault.[40]

Intention and Ability to Injure.

There must be at least an apparent present intention and ability to inflict the injury. Thus, to raise one's cane or fist in a threatening manner, or aim a gun, at another, when, by reason of the distance between the parties, it is evident that no injury can possibly be inflicted, would not be an assault;[41] nor would it be an assault to raise and shake one's cane at another, even within striking distance, where the menace is qualified by saying, "If you were not an old man, I would knock you down," since the words show that no injury will be inflicted.[42] Up to this point the authorities are agreed, but, when we go further, there is a direct and irreconcilable conflict. Some of the courts hold that there must be not only an apparent present ability and intention to inflict the injury, but that such intention and ability must be actual.[43] Thus, in Alabama it was held that aiming an

Rep. 656; Milton v. State, 23 Tex. App. 204, 4 S. W. 574; Melton v. State, 24 Tex. App. 284, 6 S. W. 39; People v. Gardner, 98 Cal. 127, 32 Pac. 880.

[40] Galbraith v. State (Tex. App.) 13 S. W. 607; Kemp v. Same, 25 Tex. App. 589, 8 S. W. 804.

[41] Tarver v. State, 43 Ala. 354; Smith v. State, 32 Tex. 593; McKay v. State, 44 Tex. 43.

[42] State v. Crow, 23 N. C. 375; or to raise one's hand against another, and say, "If it were not for your gray hairs, I would tear your heart out," Com. v. Eyre, 1 Serg. & R. (Pa.) 347; or to lay one's hand on his sword, and say, "If it were not assize time, I would not take such language from you," Tuberville v. Savage, 1 Mod. 3. And see Johnson v. State, 35 Ala. 363. But see State v. Hampton, 63 N. C. 13.

[43] 1 Russ. Crimes, 1019; 2 Green, Cr. Rep., and note page 271; Reg. v. James, 1 Car. & P. 530. Essential under Texas statute, Mc-

unloaded gun at another, though he supposes it to be loaded, and though it is aimed within shooting distance, and in such a menacing manner as to terrify him, is not such an assault as can be punished criminally, though it may sustain a civil action for damages.[44] Other courts, on the contrary, and modern text-books of the highest authority, hold that an actual present ability to inflict the injury is not necessary; that it is sufficient if there is a reasonably apparent present ability, so as to create an apprehension that the injury may be inflicted, and cause the person threatened to resort to measures of self-defense, or to retreat or go out of his way to avoid it, though the assailant may not get within striking distance, and may not be actually able to injure. The weight of modern authority is in favor of this doctrine.[45]

Connell v. State, 25 Tex. App. 329, 8 S. W. 275; Ware v. State, 24 Tex. App. 521, 7 S. W. 240. So, also, in California, People v. Dodel, 77 Cal. 293, 19 Pac. 484; in Indiana, Klein v. State, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354.

[44] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42; State v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830. Contra, State v. Smith, 2 Humph. (Tenn.) 457; Com. v. White, 110 Mass. 407; State v. Shepard, 10 Iowa, 126; People v. Morehouse, 53 Hun, 638, 6 N. Y. Supp. 763; Reg. v. St. George, 9 Car. & P. 483. And see Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373. Firing gun loaded so that it cannot injure not an assault. State v. Swails, 8 Ind. 524, 65 Am. Dec. 772 (since overruled by Kunkle v. State, 32 Ind. 220); Henry v. State, 18 Ohio, 32. See, also, ante, p. 132, note 22.

[45] 2 Bish. New Cr. Law, § 32; 1 Whart. Cr. Law, § 606; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; Kunkle v. State, 32 Ind. 220; State v. Rawles, 65 N. C. 334; State v. Shipman, 81 N. C. 513; State v. Sims, 3 Strob. (S. C.) 137; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496; State v. Hampton, 63 N. C. 13; Cowley v. State, 10 Lea (Tenn.) 282; Morton v. Shoppoe, 3 Car. & P. 373; Stephens v. Myers, 4 Car. & P. 349; People v. Yslas, 27 Cal. 630; State v. Davis, 23 N. C. 128, 35 Am. Dec. 735; Thomas v. State, 99 Ga. 38, 26 S. E. 748; State v. Archer, 8 Kan. App. 737, 54 Pac. 927; Malone v. State, 77 Miss. 812, 26 South. 968. Aiming gun from distance from which it

Thus, where a person shot at a hole in the roof of his house, thinking that a policeman was watching there, and intending to kill him, he was held guilty of a criminal assault, though the policeman was at another place on the roof, and, under the circumstances, no injury could have been inflicted;[46] and it has repeatedly been held that to run after a person in such a threatening manner as to put him in reasonable fear, and cause him to retreat to avoid the supposed danger, is an assault; and in such cases it is immaterial whether there is an actual intention to inflict injury, or whether the assailant gets near enough to inflict injury or not.[47] It has also been held that for a person to administer a drug which he has been informed will produce death is an assault with intent to kill, though the drug may be harmless,[48] and that impotency is no defense in a prosecution for an assault with intent to rape unless defendant knew he was impotent.[49] It is possible that some of the courts which seem to require actual intention and ability to injure would hold a man guilty of an assault if he has the intention to inflict the injury, and thinks he has the present ability to inflict it, as, for instance, where a person, aiming an unloaded gun at another, thinks it is loaded, and intends to shoot; for in such case there is a criminal intention and an overt act, which, as we have seen, is all that is required before the law may proceed to pun-

will not carry, an assault, Tarver v. State, 43 Ala. 354; Smith v. State, 32 Tex. 593. Firing gun not sufficiently loaded to injure, Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691. See, also, ante, p. 133, note 23.

[46] People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165.

[47] State v. Rawles, 65 N. C. 334; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; State v. Shipman, 81 N. C. 513.

[48] State v. Glover, 27 S. C. 602, 4 S. E. 564.

[49] Territory v. Keyes, 5 Dak. 244, 38 N. W. 440.

ish.[50] In some states an actual present ability to inflict the injury intended is made necessary by statute.[51]

Justification and Excuse.

To constitute a criminal assault or assault and battery, the attempt to apply force, or the application of force, must be unlawful; that is, it must be without legal justification or excuse, either because there is no right to apply any force at all, or because the force is unreasonable in extent.[52] Whatever would justify or excuse a person in taking another's life would, of course, excuse or justify him in an assault and battery, or an assault with intent to kill; therefore, what has been said about justifiable and excusable homicide, and the cases there cited, are applicable here.[53] The reverse of this proposition, however, is not true. Very much less will excuse an assault and battery, not amounting to an assault with intent to kill or to inflict grievous bodily harm, than would be necessary to justify or excuse a homicide.

An accident happening in the performance of a lawful act with due care will excuse an assault and battery resulting therefrom;[54] but if the accident happens in doing an act which is malum in se, and not merely malum prohibitum,[55] or if it happens because of culpable negligence, there is no excuse.[56] If the act is unlawful or likely to produe injury,

[50] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42.

[51] Pratt v. State, 49 Ark. 179, 4 S. W. 785; McCullough v. State, 24 Tex. App. 128, 5 S. W. 839; People v. Leong Yune Gun, 77 Cal. 636, 20 Pac. 27. But see People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165.

[52] Com. v. Randall, 4 Gray (Mass.) 36.

[53] Ante, pp. 159, 160, et seq.

[54] 1 Russ. Crimes, 1025; ante, pp. 89, 176.

[55] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362.

[56] Discharging pistol in violation of city ordinance, Com. v. Hawkins, 157 Mass. 551, 32 N. E. 862. One who throws a stone in sport and injures another is guilty. Hill v. State, 63 Ga. 578, 36 Am.

it is no excuse that there was no intention to injure, or to injure the person actually struck. Thus, an old case held that where a lighted squib was thrown into a market place, and, being tossed from hand to hand by different persons, at last hit a person in the face, and put out his eye, this was an assault and battery by the person who first threw it.[57] So, also, throwing or shooting into a crowd is an assault on all, and an assault and battery on any one who may be struck; or shooting with intent to kill one man, and hitting another, is an assault with intent to kill the latter.[58]

An officer or private person legally arresting or restraining a person does not commit an assault and battery, as the law justifies him;[59] but it is otherwise if the arrest or restraint is illegal, either because there is no right to arrest

Rep. 120. "If, when engaged in an unlawful and dangerous sport, a man kills another by accident, it is manslaughter. * * * Death produced by practical joking is manslaughter." 1 Whart. Cr. Law, § 1012. And where death does not result, but merely a bodily injury, however slight, it is an assault and battery. Injury to nonparticipating student in game of "rush" by other students held an assault and battery. Markley v. Whitman, 95 Mich. 236, 54 N. W. 763, 20 L. R. A. 55, 35 Am. St. Rep. 558.

[57] Scott v. Shepherd, 2 W. Bl. 892.

[58] Perry v. People, 14 Ill. 496; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; State v. Gilman, 69 Me. 163, 31 Am. Rep. 257; State v. Myers, 19 Iowa, 517; Walker v. State, 8 Ind. 290; Callahan v. State, 21 Ohio St. 306; Vandermark v. People, 47 Ill. 122; State v. Montgomery, 91 Mo. 52, 3 S. W. 379; People v. Raher, 92 Mich. 165, 52 N. W. 625, 31 Am. St. Rep. 575; State v. Merritt, 61 N. C. 134. Contra, Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Scott v. State, 49 Ark. 156, 4 S. W. 750; People v. Robinson, 6 Utah, 101, 21 Pac. 403.

[59] State v. Hull, 34 Conn. 132; State v. Gregory, 30 Mo. App. 582; Baker v. Barton, 1 Colo. App. 183, 28 Pac. 88; U. S. v. Fullhart, 47 Fed. (C. C.) 802; State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44.

or restrain at all, or because unnecessary force or unauthorized restraint is used.[60]

A parent, guardian, teacher, or master chastising his child, ward, pupil, or apprentice does not commit a criminal assault and battery if the punishment is moderate;[61] but it is otherwise if the punishment is immoderate,[62] or, in case of teacher and pupil, if it is for breach of an unreasonable rule.[63] A person in charge of a railroad train, station, or other public

[60] State v. Parker, 75 N. C. 249, 22 Am. Rep. 669; State v. Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; Burns v. State, 80 Ga. 544, 7 S. E. 88; State v. Roseman, 108 N. C. 765, 12 S. E. 1039; Stone v. State, 56 Ark. 345, 19 S. W. 968; Delafoile v. State, 54 N. J. Law, 381, 24 Atl. 557, 16 L. R. A. 500. Use of handcuffs, when authorized, State v. Sigman, 106 N. C. 728, 11 S. E. 520. To shoot at one who is escaping after arrest for misdemeanor is an assault. Id. See, ante, p. 161 et seq.; and see Ben. & H. Lead. Cas. 177, and note.

[61] Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; State v. Harris, 63 N. C. 1; married minor child, Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682; teacher and pupil, Com. v. Randall, 4 Gray (Mass.) 36; Metcalf v. State, 21 Tex. App. 174, 17 S. W. 142; Heritage v. Dodge, 64 N. H. 297, 9 Atl. 722; Bolding v. State, 23 Tex. App. 172, 4 S. W. 579; Hutton v. State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776. An elder brother, caring for and supporting a 15 year old sister, may moderately restrain and correct her. Snowden v. State, 12 Tex. App. 105, 41 Am. Rep. 667.

[62] Fletcher v. People, 52 Ill. 395; Hinkle v. State, 127 Ind. 490, 26 N. E. 777; Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; Neal v. State, 54 Ga. 281. In Alabama it is held that excessive punishment does not render a parent liable, unless there is also legal malice or some permanent injury. Dean v. State, 89 Ala. 46, 8 South. 38; Boyd v. State, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31. Excessive punishment by teacher, Patterson v. Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Boyd v. State, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31.

[63] State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266, 9 Am. St. Rep. 820.

place may eject a passenger or other person for conduct which disturbs the peace or safety of other passengers or persons there present, or for violation of reasonable rules.[64] But if he acts without sufficient ground, or uses unreasonable force, he will be guilty of assault and battery.[65] A husband could at one time punish his wife, but it is generally held that he no longer has such a right.[66] There are cases, however, which recognize the right as still existing.[67] A master could formerly punish his servant, but he cannot do so now without being guilty of an assault.[68] There are exceptions to this statement in case of apprentices,[69] and also in case of seamen while at sea.[70]

If a person is assaulted without felonious intent, he may defend himself, and use all necessary force for the purpose of repelling his assailant, provided he does not go to the extreme of taking his assailant's life or inflicting grievous bodily harm. He can only go to this extreme when necessary to save his life or prevent grievous bodily harm, and he cannot in any

[64] State v. Goold, 53 Me. 279; Com. v. Dougherty, 107 Mass. 243 (sexton in church); People v. Caryl, 3 Parker, Cr. R. (N. Y.) 326; Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. 590.

[65] People v. McKay, 46 Mich. 439, 9 N. W. 486, 41 Am. Rep. 169; New Jersey Steam-Boat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049. Ejecting person wrongfully on train before it has stopped is a criminal assault. State v. Kinney, 34 Minn. 311, 25 N. W. 705.

[66] Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383; State v. Oliver, 70 N. C. 60; Reg. v. Jackson [1891] 1 Q. B. Div. 671.

[67] Com. v. Wood, 97 Mass. 225.

[68] Matthews v. Terry, 10 Conn. 455; Com. v. Baird, 1 Ashm. (Pa.) 267.

[69] State v. Dickerson, 98 N. C. 708, 3 S. E. 687; Davis v. State, 6 Tex. App. 133.

[70] Thompson v. The Stacey Clarke (D. C.) 54 Fed. 533; Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793; U. S. v. Beyer (C. C.) 31 Fed. 35.

case use more force than is necessary, without himself becoming liable as for assault and battery.[71] An unlawful attempt to arrest or a false imprisonment is an assault which may be resisted by necessary force, short of taking life or inflicting grievous bodily harm.[72] One may also defend a person with whom he stands in a family relation, without being guilty of an assault, whenever, under the circumstances, he would have the right to defend himself, but not otherwise.[73] A person is not bound to retreat to avoid an assault, but may stand his ground and return blow for blow, and he need not wait for the intended blow to fall before striking to prevent it;[74] but, as we have seen, if, in the course of the difficulty, his assailant manifests a purpose to take his life or to inflict grievous bodily harm, he must retreat, if he can safely do so, before going to the extreme of killing his assailant to save himself.[75] The principle that one who brings on a difficulty cannot defend himself, which has been discussed in treating of homicide in self-defense, applies likewise to assaults in self-defense.[76]

A person, while he cannot kill another, or use a deadly weapon, to prevent a trespass on his property[77] not amounting to an attempt to commit a felony by force or surprise,[78] may use any necessary force short of this in resisting a forci-

71 Floyd v. State, 36 Ga. 91, 91 Am. Dec. 760.

72 Massie v. State, 27 Tex. App. 617, 11 S. W. 638. But the person sought to be arrested, and making the assault, must know that the arrest is illegal.

73 Jones v. Fortune, 128 Ill. 518, 21 N. E. 523; Drinkhorn v. Bubel, 85 Mich. 532, 48 N. W. 710.

74 Gallagher v. State, 3 Minn. 270 (Gil. 185).

75 Ante, p. 182.

76 People v. Miller, 49 Mich. 23, 12 N. W. 895; see ante, p. 183.

77 State v. Gilman, 69 Me. 163, 31 Am. Rep. 257; State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714; People v. Horton, 4 Mich. 67.

78 Ante, p. 164.

ble trespass. If a person seeks to take or injure another's property, not by robbery, or to trespass on his premises otherwise than by forcibly attempting to enter his habitation, the latter may use all necessary force, short of force endangering life, to prevent the trespass or to eject the trespasser.[79] It is said that one cannot use force to recapture his property, nor attack a trespasser who has retreated, but must resort to the law for redress;[80] but, if the owner's possession of property is only momentarily interrupted, he may use force to regain it.[81] In no case can more force be used

[79] Com. v. Kennard, 8 Pick. (Mass.) 133 (resisting attempt to take chattel); Com. v. Clark, 2 Metc. (Mass.) 23 (ejecting trespasser); People v. Payne, 8 Cal. 341; People v. Batchelder, 27 Cal. 69, 85 Am. Dec. 231; People v. Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143; Com. v. Ribert, 144 Pa. 413, 22 Atl. 1031; Circle v. State (Tex. Cr. App.) 22 S. W. 603; State v. Taylor, 82 N. C. 554; State v. Austin, 123 N. C. 749, 31 S. E. 731. May not use deadly weapon. Montgomery v. Com., 98 Va. 840, 36 S. E. 371. Defense of one's dog justifiable. State v. McDuffie, 34 N. H. 523, 69 Am. Dec. 516. A saloon being a house of public entertainment, the proprietor cannot eject one who is guilty of no misconduct, and is engaged in the business usually transacted there. Connors v. State, 117 Ind. 347, 20 N. E. 478. Otherwise in case of misconduct. Burrell v. State, 129 Ind. 290, 28 N. E. 699. In Texas it was held that the law recognizes no rules for the protection of a gambling room or games played in violation of law, and therefore a gambler cannot justify an assault on the ground that it was committed in ejecting the person assaulted from the gambling room for disorder. Pierce v. State, 21 Tex. App. 540, 1 S. W. 463.

[80] State v. Conally, 3 Or. 69; Hendrix v. State, 50 Ala. 148; Kirby v. Foster, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317. Cannot assault officer and retake animals impounded under an invalid ordinance. State v. Black, 109 N. C. 856, 13 S. E. 877, 14 L. R. A. 205.

[81] Com. v. Donahue, 148 Mass. 529, 20 N. E. 171; Com. v. Lynn, 123 Mass. 218; State v. Elliot, 11 N. H. 540, 545. The right of re-

than is necessary.[82] A person may eject a trespasser from his house, but, if he kicks him, he commits an assault and battery.[83] Mere abusive words or malignant and taunting gestures are never a justification, even for a common assault.[84]

Same—Consent of Person Assaulted.

Consent of the person assaulted and beaten is a defense,[85] provided the act consented to does not amount or tend to a breach of the public peace, and is not with intent to commit such a crime that, in case the crime were accomplished, consent would be no exuse; and provided the person is old enough and of sufficient mental capacity to be deemed in law capable of consenting; and provided, further, that the consent is not obtained by fraud or intimidation.

capture is not lost, though the property is temporarily out of sight, if pursuit is immediate. State v. Dooley, 121 Mo. 591, 26 S. W. 558.

[82] State v. Tripp, 34 Minn. 25, 24 N. W. 290; State v. Burke, 82 N. C. 551. Unnecessary force in resisting unlawful arrest, People v. Murray, 54 Hun, 406, 7 N. Y. Supp. 548. In Michigan it is held that a person violently and causelessly assaulted by another is not limited to the use of force so long only as the necessity for self-defense exists, but may chastise the aggressor within the natural limits of the provocation received. People v. Pearl, 76 Mich. 207, 42 N. W. 1109, 4 L. R. A. 709, 15 Am. St. Rep. 304.

[83] Wild's Case, 2 Lewin, Cr. Cas. 214.

[84] State v. Workman, 39 S. C. 151, 17 S. E. 694; Scott v. Fleming, 16 Ill. App. 540; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; Donnelly v. Harris, 41 Ill. 126; Cross v. State, 63 Ala. 40; Rauck v. State, 110 Ind. 384, 11 N. E. 450; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Tatnall v. Courtney, 6 Houst. (Del.) 434; State v. Briggs (Tex. Cr. App.) 21 S. W. 46. Contra, Murphy v. State, 92 Ga. 75, 17 S. E. 845; Hodgkins v. State, 89 Ga. 761, 15 S. E. 695. Threats without hostile demonstration no defense. Martin v. State, 5 Ind. App. 453, 32 N. E. 594.

[85] State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190; Champer v. State, 14 Ohio St. 437; People v. Bransby, 32 N. Y. 525.

The law recognizes as not necessarily unlawful manly sports calculated to give bodily skill, strength, and activity, such as playing at cudgels or foils or wrestling or sparring by consent, there being no motive or intention to do bodily harm on either side. But prize fights and encounters which are, or even tend to, breaches of the peace, are unlawful, even when entered into by consent.[86]

If persons voluntarily engage in mutual combat in a public place, as in case of prize fighting, so as to commit a breach of the public peace, either may be prosecuted for an assault on the other, notwithstanding their mutual consent.[87] A wrestling match is a lawful sport, but if persons engage in a wrestling match for the purpose of doing each other injury, each endeavoring to do and doing all the injury in his power to the other, each may be convicted of assault and battery.[88] A person cannot consent to be killed or maimed,[89] or to suffer the infliction of a dangerous act which may result in severe bodily injury.[90] If the act is not of a nature to inflict severe injury, consent is a defense; at least if the act, under the circumstances, does not tend to a breach of the peace.[91]

Where the assault is with intent to commit a specific crime, and consent to the crime would be a defense on a prosecution therefor, consent will be a defense on a prosecution for the assault. Thus, robbery is not committed

[86] Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328.

[87] Fost. Crown Law, 260; 1 East, P. C. 270; Rex. v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

[88] Com. v. Collberg, supra.

[89] 1 Inst. 107a, 107b; Wright's Case, Co. Litt. 127a; Reg. v. Barronet, Dears. Cr. Cas. 51; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

[90] Reg. v. Bradshaw, 14 Cox, Cr. Cas. 83.

[91] State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190.

if a person consents to his property being taken, and therefore his consent would prevent an assault with intent to take his property from being an assault with intent to rob. Rape cannot be committed if the woman consents, provided she is capable of consenting; and therefore her consent will be a defense on a prosecution for assault with intent to rape. The consent, however, must be prior to the assault. If an assault with intent to rape is made, the fact that the woman afterwards consents to the intercourse will not prevent a prosecution for the assault.[92]

In all cases the person consenting must be capable of consenting. A very young child cannot consent to an assault, nor can an insane person;[93] and, where the statute against carnal knowledge of girls under a specified age expressly or impliedly makes their consent unnecessary, they cannot consent to an assault with intent to have carnal knowledge of them.[94] If consent is obtained by fraud, so that the act done, owing to the fraud, is a different act from that consented to, it

[92] State v. Hartigan, 32 Vt. 607; State v. Bagan, 41 Minn. 285, 43 N. W. 5; Dickey v. McDonnell, 41 Ill. 62; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519.

[93] Reg. v. Fletcher, 8 Cox, Cr. Cas. 131.

[94] State v. Rollins, 8 N. H. 550; State v. Farrar, 41 N. H. 53; Com. v. Nickerson, 5 Allen (Mass.) 518; Givens v. Com., 29 Grat. (Va.) 830; Hadden v. People, 25 N. Y. 373; State v. Grossheim, 79 Iowa, 75, 44 N. W. 541; Comer v. State (Tex. Cr. App.) 20 S. W. 547; Proper v. State, 85 Wis. 615, 55 N. W. 1035; In re Lloyd, 51 Kan. 501, 33 Pac. 307; Hays v. People, 1 Hill (N. Y.) 352; People v. McDonald, 9 Mich. 150; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Murphy v. State, 120 Ind. 115, 22 N. E. 106, overruling Stephens v. State, 107 Ind. 185, 8 N. E. 94; People v. Goulette, 82 Mich. 36, 45 N. W. 1124; Davis v. State, 31 Neb. 247, 47 N. W. 854; State v. Wray, 109 Mo. 594, 19 S. W. 86. Contra, State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; Whitcher v. State, 2 Wash. St. 286, 26 Pac. 268.

is no defense to the assault. Thus, where a medical practitioner had connection with a young girl, who submitted from a bona fide belief that he was, as he represented, treating her professionally, he was guilty of an assault.[95] So, where a person administers a deleterious drug mixed with food to one who takes it in ignorance that it contains the drug, he is guilty of assault and battery.[96] Nor is consent induced by intimidation a defense.[97]

FALSE IMPRISONMENT.

84. False imprisonment is any unlawful restraint of a person's liberty, and is a misdemeanor at common law.

False imprisonment is an offense against the liberty of a person, and is indictable as a specific crime at common law.[1] The crime necessarily includes an assault, however, and for this reason the prosecution is usually for assault, so that there are not many prosecutions for false imprisonment eo nomine. False imprisonment is also declared a crime by statute in many of the states, but some, if not all, of them,

[95] Reg. v. Case, 4 Cox, Cr. Cas. 220. See, also, Rex v. Rosinski, 1 Moody, Cr. Cas. 19. Ante, p. 221.

[96] Com. v. Stratton, 114 Mass. 303, 20 Am. Rep. 350. Where a girl had intercourse with a man, who, unknown to her, had a venereal disease, which he communicated to her, though not guilty of rape because of consent, he was guilty of an assault. Reg. v. Bennett, 4 Fost. & F. 1105. See, also, Reg. v. Sinclair, 13 Cox, Cr. Cas. 28. Where, under similar circumstances, a man had intercourse with his wife, the majority of the court held it not an assault. Reg. v. Clarence, 16 Cox, Cr. Cas. 511.

[97] Reg. v. Woodhurst, 12 Cox, Cr. Cas. 443.

§ 84. [1] 2 Inst. 589; 3 Bl. Comm. 127; 4 Bl. Comm. 218; 2 Bish. Cr. Law, § 749; People v. Ebner, 23 Cal. 158; Smith v. State, 63 Wis. 453, 23 N. W. 879; Davies v. State, 72 Wis. 54, 38 N. W. 722.

are merely declaratory of the common law.[2] The crime is committed whenever a person detains the body of another by force, actual or constructive, without his consent, and without legal cause. Two things are necessary: (1) There must be an imprisonment; and (2) the imprisonment must be unlawful. Every confinement of a person is an imprisonment, whether it be in a jail, or in a private house, or merely by detaining him for a moment in the street.[3] No actual force need be used. There is an imprisonment if one is coerced to submit to detention by threats. Any restraint of liberty is a detention, and therefore an imprisonment; as, for instance, where a man by threats and fear prevented another from going in a certain direction on a public road, and compelled him either to stop, or to turn back, or even to take another direction.[4] If an officer arrests a person on the street, and detains him even for a moment, there is an imprisonment. The imprisonment, however, to be criminal, must be false; that is, it must be without legal cause or excuse. There must be an unlawful detention, and such detention will be unlawful unless there be some sufficient authority for it, arising either from some process from the courts of justice, or from some legal warrant of a legal officer having power to commit, or arising from special cause, sanctioned for the necessity of the thing either by the common law or

[2] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; People v. Wheeler, 73 Cal. 252, 14 Pac. 796.

[3] 1 Russ. Crimes, 1024; 3 Bl. Comm. 127; Floyd v. State, 12 Ark. 43, 44 Am. Dec. 250.

[4] Harkins v. State, 6 Tex. App. 452; Bloomer v. State, 3 Sneed (Tenn.) 66; Smith v. State, 7 Humph. (Tenn.) 43; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786. Where a person is decoyed from home as a joke, and he goes willingly, there is no false imprisonment. State v. Lunsford, 81 N. C. 528. To stop a carriage in which a person is riding, without any intention of injuring him, not an offense.

by statute.[5] The crime is not committed if there is a legal right to detain. An officer who arrests a person without authority, or a judicial officer who unlawfully orders his imprisonment, or a jailer who, without authority, confines him, is guilty of this crime;[6] and a person who procures the arrest of another without any legal cause or authority is guilty, though not present when the arrest is made.[7] Even a father may be guilty of false imprisonment of his child, as, for instance, by cruelly confining him in a dark, damp, and dirty cellar, as this is unlawful correction.[8]

KIDNAPPING.

85. Kidnapping with us is a false imprisonment aggravated by conveying, and, in some states, by a mere intent to convey, the person imprisoned to another place. It is a misdemeanor at common law.[1]

Under the old common law, kidnapping was "the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another;"[2] but with us sending the person into a foreign country is not

State v. Edge, 1 Strob. (S. C.) 91. But see State v. Davis, 1 Hill (S. C.) 46.

[5] 1 Russ. Crimes, 1024.

[6] Francisco v. State, 24 N. J. Law, 30; Vanderpool v. State, 34 Ark. 174; State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529. Person aiding an officer, at the latter's command, to make an arrest without authority, is liable, as he can have no greater rights than the officer. Mitchell v. State, 12 Ark. 50, 44 Am. Dec. 253.

[7] Floyd v. State, 12 Ark. 43, 44 Am. Dec. 250.

[8] Fletcher v. People, 52 Ill. 395.

§ 85. [1] 2 Bish. New Cr. Law, §§ 750, 755; 1 East, P. C. 430; Rosc. Ev. 465.

[2] 4 Bl. Comm. 219; State v. Whaley, 2 Har. (Del.) 538; Click v. State, 3 Tex. 282.

necessary.[3] Statutes on the subject have been passed in many of the states, some of which are declaratory of the common law. Under the Illinois statute it has been held that physical force and violence in the taking and carrying away is not necessary, but that threats and menaces coercing the will are sufficient.[4] Imprisonment of a person with intent to convey him out of the state, or away from his residence is kidnapping in some states.[5] The crime is not committed if the person taken consents, provided he or she is old

[3] State v. Rollins, 8 N. H. 550. And see People v. Ebner, 23 Cal. 158; Smith v. State, 63 Wis. 453, 23 N. W. 879. Taking into another county, Ex parte Keil, 85 Cal. 309, 24 Pac. 742. An officer not complying with his warrant of arrest may be guilty. People v. Fick, 89 Cal. 144, 26 Pac. 759.

[4] Moody v. People, 20 Ill. 315. And see Smith v. State, 63 Wis. 463, 23 N. W. 879; Hadden v. People, 25 N. Y. 373; People v. Merrill, 2 Parker, Cr. R. (N. Y.) 590; Com. v. Nickerson, 5 Allen (Mass.) 518; State v. Farrar, 41 N. H. 53; Davenport v. Com., 1 Leigh (Va.) 588; Thomas v. Com., 2 Leigh (Va.) 741. Inveigling female to take passage for foreign port, under false pretenses, People v. De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444; Id., 47 Hun (N. Y.) 308. What constitutes inveiglement, People v. Fitzpatrick, 57 Hun, (N. Y.) 459, 10 N. Y. Supp. 629. To inveigle another by false representations, with intent that he shall be induced to leave the state of his apparent free will, is causing him to be sent out of the state against his will, under the Oregon statute. In re Kelly, 46 Fed. 653.

[5] Click v. State, 3 Tex. 282; Com. v. Blodgett, 12 Metc. (Mass.) 56; State v. McRoberts, 4 Blackf. (Ind.) 178; Moody v. People, 20 Ill. 315; John v. State, 6 Wyo. 203, 44 Pac. 51. The intent must be alleged and proved. State v. Sutton, 116 Ind. 527, 19 N. E. 602. And see other cases cited. But see Boes v. State, 125 Ind. 205, 25 N. E. 218; People v. Fick, 89 Cal. 144, 26 Pac. 759. Negativing exceptions of statute, State v. Kimmerling, 124 Ind. 382, 24 N. E. 722; Pruitt v. State, 102 Ga. 688, 29 S. E. 437. Under the Indiana statute force or fraud are essential. Eberling v. State, 136 Ind. 117, 35 N. E. 1023. Any place where the child has a right to be is its "residence." Wallace v. State, 147 Ind. 621, 47 N. E. 13.

enough, and of sufficient mental capacity, to be deemed in law capable of consenting, and the consent is not obtained by fraud.[6] Under the New York statute a father who procures an adjudication that his daughter is insane, and publicly conveys her, without force, to an asylum, is not guilty of kidnapping, though the girl is in fact sane;[7] nor is a father guilty if he in good faith, after consulting physicians, causes his sane child to be confined as insane.[8]

ABDUCTION.

86. Abduction may be generally defined as the taking of a female without her consent, or without the consent of her parents or guardian, for the purpose of marriage or prostitution.

87. It is probably not a crime at common law, unless as kidnapping, but is made so by statute in most of the states.

The statutes in the different states defining the crime of abduction differ materially, and some of the statutory provisions are not included in the general definition given above. It will be well, therefore, for the student to consult his statute at this point. The statutes of most of the states are modeled after an old English statute which defined the crime substantially as the taking of a woman against her will for lucre, and afterwards marrying her, or causing her to be

[6] State v. Farrar, 41 N. H. 53; Com. v. Robinson, Thatcher, Cr. Cas. 488; State v. Rollins, 8 N. H. 550; Com. v. Nickerson, 5 Allen (Mass.) 518, 527; People v. De Leon, 47 Hun (N. Y.) 308; Castillo v. State, 29 Tex. App. 127, 14 S. W. 1011; Higgins v. Com., 94 Ky. 54, 21 S. W. 231.

[7] Under Pen. Code, § 211, providing that one who willfully seizes, confines, inveigles, or kidnaps another, with intent to cause him without authority of law to be secretly confined or imprisoned within the state. People v. Camp, 139 N. Y. 87, 34 N. E. 755. See In re Marceau, 32 Misc. Rep. (N. Y.) 217, 65 N. Y. Supp. 717.

[8] People v. Camp, 66 Hun (N. Y.) 531, 21 N. Y. Supp. 741.

married to another, or defiling her, or causing her to be defiled.[1] It seems never to have been decided whether this statute is a part of our common law, though it is old enough, if it is applicable to our conditions.[2] Among the statutory definitions the following may be stated, as they are very general, namely: For a person to take[3] or detain[4] a female unlawfully, against her will,[5] with intent to compel her to marry him or any other person,[6] or to be defiled; to take[7] or entice[8] a female under a specified age, in some states as high as eighteen years, for the purpose of prostitution,[9] or sexual intercourse,[10] or, in some states, for the purpose of concu-

§§ 86–87. [1] 3 Hen. VIII. c. 2; 4 Bl. Comm. 208.

[2] Ante, p. 19.

[3] Inducing female by solicitations and presents to leave home is a taking. State v. Johnson, 115 Mo. 480, 22 S. W. 463.

[4] For a man to go to the room of a sleeping girl, remove the bed clothes, and expose his person and hers, without awakening her, has been held a detention. Malone v. Com., 91 Ky. 307, 15 S. W. 856. And see Payner v. Com. (Ky.) 19 S. W. 927; Couch v. Com. (Ky.) 29 S. W. 29. Detention necessary. Krambiel v. Com. (Ky.) 2 S. W. 555.

[5] Detention of an insane woman is "against her will." Higgins v. Com., 94 Ky. 54, 21 S. W. 231.

[6] State v. Maloney, 105 Mo. 10, 16 S. W. 519.

[7] Force not necessary. People v. Demousset, 71 Cal. 611, 12 Pac. 788.

[8] No direct proposition to go away is necessary. People v. Carrier, 46 Mich. 442, 9 N. W. 487.

[9] People v. Cummons, 56 Mich. 544, 23 N. W. 215; Brown v. State, 72 Md. 468, 20 Atl. 186. To take a female for intercourse with one's self not within the statute. State v. Brow, 64 N. H. 577, 15 Atl. 216. See, also, State v. Rorebeck, 158 Mo. 130, 59 S. W. 67. To take girl to unoccupied house, that a third person may for that one occasion have intercourse with her, is not within the statute. Haygood v. State, 98 Ala. 61, 13 South. 325.

[10] Com. v. Cook, 12 Metc. (Mass.) 93; State v. Stone, 106 Mo. 1, 16 S. W. 890; State v. Ruhl, 8 Iowa, 447; State v. Stoyell, 54 Me.

binage;[11] or, without her parent's or guardian's[12] consent, for the purpose of marriage,[13] and, in some states, to take an infant child from its parent or guardian for any purpose;[14]

24. 89 Am. Dec. 716; People v. Parshall, 6 Parker, Cr. R. (N. Y.) 129. Purpose must be proved. State v. Jameson, 38 Minn. 21, 35 N. W. 712. The gist of the offense is the taking away against the will of the parent or guardian, and unchastity of the girl is no defense. People v. Demousset, 71 Cal. 611, 12 Pac. 788. See, to same effect, State v. Gibson, 111 Mo. 92, 19 S. W. 980; State v. Johnson, 115 Mo. 480, 22 S. W. 463; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149. Cf. South v. State, 97 Tenn. 496, 37 S. W. 210.

[11] State v. Overstreet, 43 Kan. 299, 23 Pac. 572. What is a taking for purpose of "concubinage," State v. Gibson, 108 Mo. 575, 18 S. W. 1109; State v. Bussey, 58 Kan. 679, 50 Pac. 891. If a woman is taken for the purpose of concubinage, actual sexual intercourse is not necessary. State v. Richardson, 117 Mo. 586, 23 S. W. 769. No length of time nor long continuance of intercourse is necessary. Henderson v. People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391. Taking for intercourse on single occasion not sufficient. State v. Wilkinson, 121 Mo. 485, 26 S. W. 366. Cf. State v. Bobbst, 131 Mo. 328, 32 S. W. 1149. Consent of female no defense. State v. Bobbst, supra.

[12] A guardian is any one who has rightful care of the girl. People v. Carrier, 46 Mich. 442, 9 N. W. 487.

[13] Where the girl is below the specified age, but above the age at which she can marry without her parents' consent, a man who takes her from her parents, and validly marries her, is not guilty. Cochran v. State, 91 Ga. 763, 18 S. E. 16.

[14] In Kansas, both parents being equally the natural guardians of the persons of their children, a man who assists a wife in deserting her husband, and in taking with her her minor child, is not guilty. State v. Angel, 42 Kan. 216, 21 Pac. 1075. Pennsylvania statute does not apply to father taking legitimate child from mother. Burns v. Com., 129 Pa. 138, 18 Atl. 756. Taking by persuasion is within a statute punishing one who shall "abduct or by any means induce" a child to leave its parents. State v. Chisenhall, 106 N. C. 676, 11 S. E. 518.

to inveigle[15] or entice[16] an unmarried female under a certain age, of previous chaste character,[17] into a house of ill fame or of assignation, or elsewhere,[18] for the purpose of prostitution or sexual intercourse; or for a parent or guardian, or other person having legal charge of the person of a female under a certain age, to consent to her being taken or detained for the purpose of prostitution. Some of the statutes require forcible abduction. In such case the force is supplied by fraud, threats, or undue influence.[19] Whether or not consent of the female deprives the taking of its criminal character depends on the circumstances.[20] A very young child would be deemed incapable of consenting, and her consent would be no excuse; [21] so, also, where an insane

[15] See ante, p. 249, note 4.

[16] See ante, p. 251, note 8.

[17] Actual chastity must be proved. Kauffman v. People, 11 Hun, 82; People v. Parshall, 6 Parker, Cr. R. (N. Y.) 129; Carpenter v. People, 8 Barb. (N. Y.) 603; State v. Carron, 18 Iowa, 372, 87 Am. Dec. 401. Single prior act of intercourse renders woman of "unchaste character." Lyons v. State, 52 Ind. 426. The fact of unchastity with accused, but not with other men, is no defense. People v. Millspaugh, 11 Mich. 278. Female who has been unchaste, but has reformed, is within the statute. Scruggs v. State, 90 Tenn. 81, 15 S. W. 1074. Chastity presumed. Bradshaw v. People, 153 Ill. 156, 38 N. E. 652. See, also, post, p. 368, and notes.

[18] Place must be of character named, or like place. State v. McCrum, 38 Minn. 154, 36 N. W. 102. A statute making it an offense to detain any female, by force or intimidation in any room, against her will, for prostitution, or with intent to cause her to become a prostitute and be guilty of fornication, held not to apply to a man who had intercourse with his stepdaughter against her will in his own house. Bunfill v. People, 154 Ill. 640, 39 N. E. 565.

[19] People v. Parshall, 6 Parker, Cr. R. (N. Y.) 129; Moody v. People, 20 Ill. 315. And see State v. Keith, 47 Minn. 559, 50 N. W. 691.

[20] Mason v. State, 29 Tex. App. 24, 14 S. W. 71; Lampton v. State (Miss.) 11 South. 756.

[21] State v. Farrar, 41 N. H. 53. See, also, ante, pp. 11, 219.

woman is detained for the purpose of carnal knowledge.[22] The statutes prohibiting adbuction of girls under a specified age do not require want of consent on the girl's part, and consent is no defense.[23] We have already seen that, where a girl under the age specified in the statute is abducted, it is no excuse for the accused to say that he did not know her age, or believed that she was older.[24]

[22] Higgins v. Com., 94 Ky. 54, 21 S. W. 231. See, also, ante, pp. 11, 219.

[23] Scruggs v. State, 90 Tenn. 81, 15 S. W. 1074; State v. Stone, 106 Mo. 1, 16 S. W. 890; State v. Keith, 47 Minn. 559, 50 N. W. 691.

[24] Ante, p. 87, note 14. But see, under Texas statute, Mason v. State, 29 Tex. App. 24, 14 S. W. 71.

CHAPTER X.

OFFENSES AGAINST THE HABITATION.

ARSON.

88. Arson at common law is the malicious burning of the dwelling house of another.[1]

89. To constitute the crime

(a) There must be some burning, though it may be slight.

(b) It must be of a dwelling house, or outhouse used in connection therewith.

(c) The house must belong to another, at least as occupant.

(d) The burning must be caused maliciously.

90. Arson is a felony at common law.[2]

Burning.

Some burning is essential to constitute this crime, and the burning must be of the house or some part of the realty, and not merely of personalty in the house. To set fire to and burn bedclothing or other personalty in the house, whatever may be the intent, is not arson, if the wood of the house itself is only scorched and blackened by the smoke, and not consumed at all.[3] The burning is sufficient, however slight, but there must be some consuming of the wood.[4] There need not be a blaze; mere charring will suffice, and

§§ 88–90. [1] 3 Co. Inst. 66; 1 Hale, P. C. 566; 1 Hawk. P. C. c. 39; 4 Bl. Comm. 219; 2 East, P. C. c. 21, § 1.

[2] 2 Russ. Crimes, 1024.

[3] Reg. v. Parker, 9 Car. & P. 45; Woolsey v. State, 30 Tex. App. 346, 17 S. W. 546; Reg. v. Russell, Car. & M. 541.

[4] Com. v. Tucker, 110 Mass. 403; People v. Haggerty, 46 Cal. 354; State v. Sandy, 25 N. C. 574; State v. Hall, 93 N. C. 571.

it is immaterial how soon the fire is extinguished, or whether it had to be put out, or went out of itself.[5]

Character of House.[6]

Arson is a crime against the security of a person's habitation rather than against the property,[7] and the house burned must therefore be a dwelling house, or an outhouse used in connection therewith.[8] The dwelling must be occupied, but it need not be at the time actually inhabited, provided it is usually inhabited, and the owner is only temporarily absent.[9] To burn a house just completed, and intended as a residence, but not yet used or occupied as such, or a building which has been vacated without any intention of returning, is not arson at common law.[10] The outhouses need not be actually adjoining the dwelling house, nor under the same roof, but are within the definition if they

[5] Reg. v. Russell, Car. & M. 541; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Rex v. Stallion, Russ. & M. 398; Reg. v. Parker, 9 Car. & P. 45; Blanchette v. State (Tex. Cr. App.) 24 S. W. 507; State v. Spiegel, 111 Iowa, 701, 83 N. W. 722; Benbow v. State (Ala.) 29 South. 553.

[6] The rules as to the character and occupancy of the premises are very much the same in case of arson as in case of burglary, and much of what is said in treating of the latter crime, and most of the cases cited, are applicable here. See post, p. 266.

[7] Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302; State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Adams v. State, 62 Ala. 177.

[8] 4 Bl. Comm. 221. Burning haystack not arson. Creed v. People, 81 Ill. 565.

[9] Stupetski v. Insurance Co., 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; State v. Warren, 33 Me. 30; Meeks v. State, 102 Ga. 581, 27 S. E. 675.

[10] State v. McGowan, 20 Conn. 245; State v. Warren, 33 Me. 30; Hooker v. Com., 13 Grat. (Va.) 763; State v. Wolfenberger, 20 Ind. 242; People v. Handley, 93 Mich. 46, 52 N. W. 1032; Rex v. Martin, Russ. & R. 108; Henderson v. State, 105 Ala. 82, 16 South. 931.

are within the curtilage; that is, if they are parcel thereof, and used in connection therewith, as in case of a stable.[11] The building may be occupied in part for other purposes than a dwelling; as, for instance, in the case of a store with sleeping apartments in the rear.[12] Buildings such as stables and other outhouses need not be actually inclosed by a fence to bring them within the curtilage,[13] but they must not be so far separate that they cannot be said to be part and parcel of the dwelling house. If a highway separates a barn from the dwelling house, it is not within the curtilage.[14]

Ownership.

The house must be the house of another, but it is not necessary that it be occupied by the legal owner. The actual occupant is regarded as the owner; for, as has been said, the offense is against the habitation, and not against the property merely, and ownership is laid in him in the indictment.[15] It is not arson at common law for a person to burn his own dwelling house,[16] but this is now changed in most

[11] Com. v. Barney, 10 Cush. (Mass.) 480; People v. Aplin, 86 Mich. 393, 49 N. W. 148; Washington v. State, 82 Ala. 31, 2 South. 356; Pitcher v. People, 16 Mich. 142; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Reg. v. Jones, 1 Car. & K. 303.

[12] People v. Orcutt, 1 Parker, Cr. R. (N. Y.) 252. But see People v. Fairchild, 48 Mich. 31, 11 N. W. 773.

[13] People v. Taylor, 2 Mich. 251; Pond v. People, 8 Mich. 150.

[14] Curkendall v. People, 36 Mich. 309; Luke v. State, 49 Ala. 30, 20 Am. Rep. 269. And see State v. Sampson, 12 S. C. 567, 32 Am. Rep. 513.

[15] 2 East, P. C. 1034; 4 Bl. Comm. 220; Com. v. Wade, 17 Pick. (Mass.) 395. Jail may be described as the dwelling house of the jailer. People v. Van Blarcum, 2 Johns. (N. Y.) 105; Stephens v. Com., 2 Leigh (Va.) 759.

[16] Bloss v. Tobey, 2 Pick. (Mass.) 320; State v. Lyon, 12 Conn. 487; State v. Hurd, 51 N. H. 176.

of the states by statute.[17] If, however, one sets fire to his own house, and the flames spread to the house of another, he may be guilty.[18] A wife cannot at common law be guilty of arson in burning the house of her husband, nor a husband in burning the house of his wife, which they jointly occupy as their residence;[19] but this has to a great extent been changed by the statutes in the different states defining arson, and probably by the married woman's acts in some of the states.[20] As the house must be the house of another, and the person in rightful occupancy is regarded as owner, a tenant does not commit arson at common law by burning the house he occupies.[21] And for the same reason the legal owner of a house which is in the rightful occupancy of another may be guilty of arson in burning it.[22] Since it is not arson for a man to burn his own house, the crime is not committed by one who burns a house at the owner's request, for the purpose of defrauding an insurance company.[23]

[17] Shepherd v. People, 19 N. Y. 537; State v. Hurd, 51 N. H. 176.

[18] Post, p. 260.

[19] Rex v. March. 1 Moody, Cr. Cas. 182; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

[20] Garrett v. State, 109 Ind. 527, 10 N. E. 570; Emig v. Daum, 1 Ind. App. 146, 27 N. E. 322. Contra, Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

[21] 2 East, P. C. 1029; Holmes' Case, Cro. Car. 376; State v. Hannett, 54 Vt. 83; McNeal v. Woods, 3 Blackf. (Ind.) 485; State v. Lyon, 12 Conn. 487.

[22] State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Sullivan v. State, 5 Stew. & P. (Ala.) 175.

[23] Heard v. State, 81 Ala. 55, 1 South. 640; State v. Haynes, 66 Me. 307, 22 Am. Rep. 569; Com. v. Makely, 131 Mass. 421; Roberts v. State, 7 Cold. (Tenn.) 359; State v. Sarvis, 45 S. C. 659, 24 S. E. 53, 32 L. R. A. 647, 55 Am. St. Rep. 806.

Malice.

The state of mind necessary to constitute the crime is described as "malicious." This, however, means no more than general criminal intent.[24] It is enough if the burning be intentional. Mere carelessness or negligence is not enough.[25] But, since a man is presumed to intend the natural and probable consequences of his acts, if he sets fire to his own house,[26] or to a building which is not a dwelling house,[27] and the fire spreads to an adjoining dwelling house as a natural result, he is guilty of arson. Inasmuch as the burning need not be with a specific intent,[28] like the breaking and entry in burglary,[29] the doctrine of constructive intent[30] is applicable. If, while engaged in the commission of a distinct felony, one unintentionally sets fire to a dwelling house, he commits arson.[31] And it has frequently been declared that, if a man were to fire a gun with felonious intent, as to commit murder, and should thereby accidentally set fire to a dwelling house, the burning would be arson.[32] If the act intended were less than felony,—as a misdemeanor, or a mere trespass,—the doctrine of constructive intent would not apply.[33]

It has been held not to be arson willfully to set fire to a

[24] 2 Bish. New Cr. Law, § 14.

[25] 3 Co. Inst. 67.

[26] Isaac's Case, 2 East, P. C. 1031 (where an owner sets fire to defraud insurer); Probert's Case, Id. 1030.

[27] State v. Laughlin, 53 N. C. 354; Combs v. Com., 93 Ky. 313, 20 S. W. 221.

[28] Ante, p. 46.

[29] Post, p. 264.

[30] Ante, p. 53.

[31] 3 Co. Inst. 67.

[32] 2 East, P. C. 1019. Otherwise under statutes requiring a specific intent. Reg. v. Faulkner, 13 Cox, Cr. Cas. 550. Ante, p. 53.

[33] 1 Bish. New Cr. Law, § 334; 2 Bish. New Cr. Law, § 14.

jail, merely for the purpose of escaping, escape being a misdemeanor only,[34] but the weight of authority is to the contrary, and the latter cases would seem right on principle. In such a case there surely is an intent to burn the jail, and what difference can it make that the motive is to escape, and not to consume the jail? The motive is immaterial. The law looks for the criminal intent, and this intent is inferred from the intentional doing of the wrongful act. There would be just as much reason in holding a person not guilty of arson who willfully burns another's dwelling house for the purpose of getting in to steal property not of sufficient value to constitute the larceny a felony. On the other hand, if the decision that burning a jail to escape is not arson is based on the ground that there is no malice in the burning, it cannot be sustained on principle. The intent is to burn the jail and the act is intentional. Nothing more is needed to constitute malice. One who burns a dwelling house may do so for the purpose of burning the occupant, and not merely to consume the house, and he would certainly be guilty of arson.[35] To burn a house by setting fire to another house, or one's own house, is arson of the house burned.[36]

[34] State v. Mitchell, 27 N. C. 350; Delany's Case, 41 Tex. 601; People v. Cotteral, 18 Johns. (N. Y.) 115; Jenkins v. State, 53 Ga. 33, 31 Am. Rep. 255. Contra, Luke v. State, 49 Ala. 30, 20 Am. Rep. 269; Smith v. State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773 (overruling Delany's Case, supra); Lockett v. State, 63 Ala. 5; Willis v. State, 32 Tex. Cr. R. 534, 25 S. W. 123. And see Jesse v. State, 28 Miss. 100; Com. v. Posey, 4 Call, 109, 2 Am. Dec. 560; Stevens v. Com., 4 Leigh (Va.) 683.

[35] Smith v. State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; Luke v. State, 49 Ala. 30.

[36] 3 Inst. 67; 1 Hale, P. C. 569; Combs v. Com., 93 Ky. 313, 20 S. W. 221.

Statutory Changes in the Law.

In most of the states there are statutes which very materially change the common law by declaring it arson to burn other buildings than a dwelling house, such as vacant houses, shops, warehouses, vessels, and railroad cars, or to burn lumber, hay, grain, and the like. In some states it is declared arson for a person to burn his own house to obtain the insurance thereon, and defraud the underwriters. In a few of the states the crime is divided into degrees; the first degree being where the burning is in the nighttime, and when there is a human being in the building; the second degree, where the burning, under the same circumstances, is done in the daytime, or where the burning is at night, but there is no human being in the building; and the third degree comprising the less serious burnings. The statutes differ very materially, and it would not be practicable to do more than to direct attention to them.

BURGLARY.

91. Burglary at common law is the breaking and entering of the dwelling house of another in the nighttime, with intent to commit a felony therein.[1]

92. To constitute the crime

(a) There must be an actual or constructive breaking, and

(b) An entry.

(c) The house broken and entered must be the dwelling house of another. An outhouse within the curtilage is regarded as part of the dwelling house.

(d) Both the breaking and entry must be in the nighttime.

(e) And both must be with the intent to commit a felony in the house.

93. Burglary is a felony at common law.[2]

§§ 91–93. [1] 1 Hale, P. C. 358, 559; Hawk. P. C. c. 38; East, P. C. 495; 4 Bl. Comm. 224.

[2] 2 Russ. Crimes, 1024.

The Breaking.

Some breaking is essential to constitute the crime of burglary. Breaking consists in putting aside a part of the house which obstructs entrance and is closed, or in penetrating by an opening which is as much closed as the nature of the case admits. Entering through an open door or window,[3] or even pushing open a door or window which is partially, but not sufficiently, open,[4] is not burglary. Nor is it burglary to enter through an opening in the wall or roof,[5] though it is otherwise if the entry is through the chimney, for that is as much closed as the nature of things will permit.[6] It is burglary, however, to enter through an open door or window, and afterwards break an inner door.[7] The slightest actual breaking of any part of the house is sufficient.[8] The mere raising of a closed window or trapdoor held in

[3] Rex v. Spriggs, 1 Moody & R. 357; Rex v. Lewis, 2 Car. & P. 628; Johnson's Case, 2 East, P. C. 488; State v. Boon, 35 N. C. 244, 57 Am. Dec. 555; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; Rolland v. Com., 85 Pa. 66, 27 Am. Rep. 626; Williams v. State (Tex. App.) 13 S. W. 609; Neiderluck v. State, 23 Tex. App. 38, 3 S. W. 573; McGrath v. State, 25 Neb. 780, 41 N. W. 780.

[4] Rex v. Hyams, 7 Car. & P. 441; Rex v. Smith, 1 Moody, Cr. Cas. 178; Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556; Com. v. Steward, 7 Dane, Abr. 136; Rose v. Com. (Ky.) 40 S. W. 245.

[5] Rex v. Spriggs, 1 Moody & R. 357.

[6] 1 Hawk. P. C. c. 38, § 4; 4 Bl. Comm. 226; Rex v. Brice, Russ. & R. 450; Donohoo v. State, 36 Ala. 281; State v. Willis, 52 N. C. 190; Walker v. State, 52 Ala. 376; Olds v. State, 97 Ala. 81, 12 South. 409; State v. Boon, 35 N. C. 244, 57 Am. Dec. 555.

[7] Rex v. Johnson, 2 East, P. C. 488; State v. Scripture, 42 N. H. 485; Johnston v. Com., 85 Pa. 54, 27 Am. Rep. 622; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; Rolland v. Com., 85 Pa. 66, 27 Am. Rep. 626.

[8] Entrance by digging under wall of unfloored building sufficient. Pressley v. State, 111 Ala. 34, 20 South. 647.

place by its weight only,[9] or the breaking of an iron grating or twine netting over an open window,[10] or the lifting of a latch or other fastening,[11] or the turning of a knob in opening a door, or pushing open a closed door,[12] is a sufficient breaking. So, also, it is a breaking to push open a closed transom,[13] or to knock out a pane of glass which is already cracked.[14] Breaking out of a house after having entered without breaking, and having committed a felony while therein, was not burglary at common law.[15] It was made so in

[9] Rex v. Haines, Russ. & R. 450; State v. Fleming, 107 N. C. 905, 12 S. E. 131; State v. Boon, 35 N. C. 244, 57 Am. Dec. 555; Rex v. Russell, 1 Moody, Cr. Cas. 377; Rex v. Hyams, 7 Car. & P. 441; State v. Herbert (Kan.) 66 Pac. 235. But see Rex v. Lawrence, 4 Car. & P. 231. The fact that the accused slightly raised the window in the daytime, so that the bolt would not fasten, did not devest subsequent breaking and entry in the night of its character as burglary. People v. Dupree, 98 Mich. 26, 56 N. W. 1046.

[10] People v. Nolan, 22 Mich. 229; Com. v. Stephenson, 8 Pick. (Mass.) 354.

[11] State v. Moore, 117 Mo. 395, 22 S. W. 1086; State v. O'Brien, 81 Iowa, 93, 46 N. W. 861.

[12] Kent v. State, 84 Ga. 438, 11 S. E. 355, 20 Am. St. Rep. 376; Lyons v. People, 68 Ill. 271; State v. Reid, 20 Iowa, 413; Hild v. State, 67 Ala. 39; Finch v. Com., 14 Grat. (Va.) 643; State v. Groning, 33 Kan. 18, 5 Pac. 446; State v. Conners, 95 Iowa, 485, 64 N. W. 295; Ferguson v. State, 52 Neb. 432, 72 N. W. 590, 66 Am. St. Rep. 512 (although entrance might have been effected through open door).

[13] Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; Dennis v. People, 27 Mich. 151. But not if the transom is open, McGrath v. State, 25 Neb. 780, 41 N. W. 780.

[14] Reg. v. Bird, 9 Car. & P. 44.

[15] Adkinson v. State, 5 Baxt. (Tenn.) 569, 30 Am. Rep. 69; State v. McPherson, 70 N. C. 239, 16 Am. Rep. 769; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758; Brown v. State, 55 Ala. 123, 28 Am. Rep. 693; White v. State, 51 Ga. 285. Contra, State v. Ward, 43 Conn. 489, 21 Am. Rep. 665.

England by an early statute,[16] but this statute is not generally regarded in this country as part of the common law. In many states breaking out after commission of a crime within the house is made burglary by statute. The breaking must be of some part of the house or outhouse. Breaking into a chest, box, or trunk in the house is not sufficient.[17] Nor is it sufficient where an area gate or gate leading into the yard is broken, and the house entered without breaking.[18]

Same—Constructive Breaking.

The breaking need not be actual, but may be constructive; as where entry is effected by fraud or threats. Thus, one who, with intent to commit a felony in a house, knocks at the door, and, on its being opened by the owner of the house, rushes in, constructively breaks in.[19] The entry, however, must be made before the owner has had time to fasten the door.[20] One may also constructively break into a house by getting in under false pretenses, with intent to commit a felony therein; as, for instance, where he pretends that he has business with the owner of the house, or where he conceals himself in a chest, and thus gains access.[21] Another instance is where a person enters by means of an accomplice on the inside;[22] as where he enters under a precon-

[16] 12 Anne, c. 1, § 7 (1713).

[17] 2 East, P. C. 488; Case of Gibbons, Fost. Crown Law, 109; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; State v. Scripture, 42 N. H. 485.

[18] Rex v. Davis, Russ. & R. 322; Rex v. Bennett, Russ. & R. 288.

[19] 1 Hawk. P. C. c. 38, § 5; 4 Bl. Comm. 226, 227; Le Mott's Case, Kel. J. 42; State v. Henry, 31 N. C. 463.

[20] State v. Henry, 31 N. C. 463.

[21] Johnston v. Com., 85 Pa. 54, 27 Am. Rep. 622; State v. Mordecai, 68 N. C. 207; State v. Johnson, 61 N. C. 186, 93 Am. Dec. 587; Nicholls v. State, 68 Wis. 416, 32 N. W. 543, 60 Am. Rep. 870; Ducher v. State, 18 Ohio, 308, 317.

[22] Com. v. Lowrey, 158 Mass. 18, 32 N. E. 940.

certed agreement with a servant or apprentice, who unlocks and opens the door for him.[23] Entering through a chimney is more properly a constructive breaking.[24]

Entry.

An entry is also necessary to constitute the crime of burglary. Breaking without entering is not burglary, but any entry, however slight, seems to be sufficient; as, for instance, where a head, a hand, an arm, or a foot is thrust within the house,[25] or even where a gun is thrust through a window which has been broken, or a hook inserted for the purpose of taking out goods.[26] Getting part of the way down a chimney has been held a sufficient entry, though the burglar got stuck, and could not get into any of the rooms.[27] It was even held a sufficient entry where a hole was bored from below into the floor of a building, for the purpose of stealing grain, and the grain withdrawn by allowing it to fall into a sack.[28] Entry from the outside of a cellar under a dwelling house is an entry of the dwelling.[29] The entry need not be at the same time as the breaking, provided both

[23] State v. Rowe, 98 N. C. 629, 4 S. E. 506. See, also, post, p. 269.

[24] Ante, p. 262.

[25] Rex v. Perkes, 1 Car. & P. 300; Reg. v. O'Brien, 4 Cox, Cr. Cas. 398; Harrison v. State, 20 Tex. App. 387, 54 Am. Rep. 529; Franco v. State, 42 Tex. 276; Com. v. Glover, 111 Mass. 395; Rex v. Davis, Russ. & R. 499.

[26] State v. McCall, 4 Ala. 643, 39 Am. Dec. 314; Rex v. Bailey, Russ. & R. 341; Rex v. Rust, 1 Moody, Cr. Cas. 183. But see Reg. v. Wheeldon, 8 Car. & P. 747.

[27] Brice's Case, Russ. & R. 450; Olds v. State, 97 Ala. 81, 12 South. 409.

[28] Walker v. State, 63 Ala. 49, 35 Am. Rep. 1. See, also, State v. Crawford, 8 N. D 539, 80 N. W. 193, 46 L. R. A. 312, 73 Am. St. Rep. 772.

[29] Mitchell v. Com., 88 Ky. 349, 11 S. W. 209.

be in the night. Breaking on one night and entering on the next is burglary.[30]

Character and Occupancy of Premises.

The house broken must, at common law, be a dwelling house or an outhouse within the curtilage.[31] Any building within the curtilage is within the definition.[32] It is not necessary that the dwelling be at the time occupied, provided, however, the tenants are only temporarily absent;[33] if they never entered into occupancy, or have left with no intention of returning, the building is not a dwelling.[34] A store in

[30] Com. v. Glover, 111 Mass. 395; Rex. v. Smith, Russ. & R. 341. And see People v. Gibson, 58 Mich. 368, 25 N. W. 316.

[31] Fisher v. State, 43 Ala. 17; State v. Outlaw, 72 N. C. 598; State v. Potts, 75 N. C. 129; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34; Rex v. Gibbons, Russ. & R. 442; Rex v. Martin, Russ. & R. 108. A room or rooms in an apartment or tenement house, rented to separate families, and with a door and entry common to all, constitute each the dwelling house of the particular occupant, within the meaning of the law. People v. Bush, 3 Parker, Cr. R. (N. Y.) 556; Mason v. People, 26 N. Y. 200; 1 Hale, P. C. 556. Burglary may be committed in a city house to which the owner has removed his furniture with the intention of occupying it after his return from his summer residence, though he has never lodged in the house. Com. v. Brown, 3 Rawle (Pa.) 207. Not a barn in a different inclosure. Whalen v. Com. (Ky.) 32 S. W. 1095.

[32] 4 Bl. Comm. 225; 2 Russ. Crimes, 14; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714. What within the curtilage, State v. Sampson, 12 S. C. 567, 32 Am. Rep. 513. A barn, People v. Aplin, 86 Mich. 393, 49 N. W. 148; Pitcher v. People, 16 Mich. 142. Entering at back of outhouse, the front part of which is within the curtilage, is burglary. Fisher v. State, 43 Ala. 17.

[33] Anon., Moore, 660, pl. 903; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109. And see Stupetski v. Insurance Co., 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195. Schwabacher v. People, 165 Ill. 618, 46 N. E. 809. See, also, ante, p. 256, notes 9 and 10.

[34] Rex v. Lyons, Leach (4th Ed.) 185; Rex v. Davies, Id. 876.

which a person habitually sleeps as watchman is a dwelling.[35] And so, also, a store, with sleeping apartments above or in the rear, may be a dwelling.[36] The breaking and entry may be into part of a house by one who has a right to be in the other part; as, for instance, where a guest at a hotel breaks into the room of another guest,[37] or where a servant breaks into the room of one of the inmates.[38] The rules as to the character and occupancy of the premises, and as to breaking into outhouses within the curtilage, are very much the same as in case of arson; so it is unnecessary to repeat what has been said in treating of that crime. What was said there, and the cases cited, are applicable here.[39]

Nighttime.

At common law, breaking and entering a dwelling house in the daytime is not burglary. The breaking and entry must both be in the nighttime. According to the common law, nighttime begins when daylight ends, or when the countenance ceases to be reasonably discernible by the light of the sun, and ends at earliest dawn, or as soon as the countenance becomes discernible; and the fact that it is bright moonlight, or that the place around the house is brightly lighted by gas, is immaterial.[40] "Nighttime" is defined by statute in some of the states.

[35] State v. Williams, 90 N. C. 724, 47 Am. Rep. 541.

[36] People v. Griffin, 77 Mich. 585, 43 N. W. 1061. And see Moore v. People, 47 Mich. 639, 11 N. W. 415. But see People v. Calderwood, 66 Mich. 92, 33 N. W. 23; Quinn v. People, 71 N. Y. 561, 27 Am. Rep. 87.

[37] State v. Clark, 42 Vt. 629. See note 31.

[38] Rex v. Gray, 1 Strange, 481; Colbert v. State, 91 Ga. 705, 17 S. E. 840.

[39] Ante, p. 356.

[40] 4 Bl. Comm. 224; 3 Inst. 63; State v. Bancroft, 10 N. H. 105; People v. Griffin, 19 Cal. 578; State v. Morris, 47 Conn. 179; Laws

Intent.

There must be an intent to commit a felony within the house,[41] and, where the breaking and entry are at different times, both must be done with such intent.[42] No other intent, however wrong it may be, will suffice. The intent may, and necessarily must in most cases, be inferred from the facts; as from the fact that a felony is actually committed or attempted, or from the fact that the entry is in the nighttime.[43] Burglary is generally committed with intent to steal, but there are frequent cases where the intent is to rape or commit other crimes.[44] Breaking and entry with intent to commit a misdemeanor is not burglary. Entry with intent to steal less than ten dollars, such a larceny being by statute a misdemeanor only, would not be burglary, but it would be otherwise if the intending thief did not know the amount of money in the house, and intended to steal whatever he might find.[45] The intent must exist at the time of the breaking and entry. If it is conceived for the first time after entry, and carried out, the crime is not committed.[46] If the felonious

v. State, 26 Tex. App. 643, 10 S. W. 220; Ashford v. State, 36 Neb. 38, 53 N. W. 1036; State v. McKnight, 111 N. C. 690, 16 S. E. 319.

[41] Dobb's Case, 2 East, P. C. 513; Com. v. Newell, 7 Mass. 245; State v. Cooper, 16 Vt. 551; Price v. People, 109 Ill. 109; State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

[42] State v. Moore, 12 N. H. 42.

[43] Steadman v. State, 81 Ga. 736, 8 S. E. 420; State v. Fox, 80 Iowa, 312, 45 N. W. 874, 20 Am. St. Rep. 425; Alexander v. State, 31 Tex. Cr. R. 359, 20 S. W. 756.

[44] Harvey v. State, 53 Ark. 425, 14 S. W. 645, 22 Am. St. Rep. 229; Walton v. State, 29 Tex. App. 163, 15 S. W. 646; Williams v. State (Tex. App.) 13 S. W. 609.

[45] Harvick v. State, 49 Ark. 514, 6 S. W. 19. Where information charges intent to steal, it is necessary to prove that the property possessed some value, and was within the building. Bergeron v. State, 53 Neb. 752, 74 N. W. 253.

[46] State v. Moore, 12 N. H. 42.

intent exists at the time of the breaking and entry, the offense is none the less burglary because the offender is interrupted and frightened off before he has carried out his intent, or because he changes his intent afterwards, or because, in case of intent to steal, there is nothing in the house to be stolen.[47]

Statutory Changes.

In many of the states, statutes have been passed declaring it to be burglary for a person to break into other places than a dwelling house, as, for instance, into warehouses, shops, railroad cars, etc., and to break and enter in the daytime, as well as at night. In some states, burglary, like arson, has been divided into degrees.

Consent to Breaking and Entry.

We have just seen that, if a person gets into a house by trick or fraud with intent to commit a felony therein, he constructively breaks in and commits burglary, though the door may be opened for him by the occupant; and that he may also constructively break in by having the door opened by an accomplice on the inside, or by a servant or apprentice of the occupant, under a preconcerted arrangement with him.[48] There is still another way in which the question of consent to the entry may arise. If the owner of a house, knowing that a burglary is to be committed, merely fails to take any steps to prevent it, but lies in wait for the purpose of apprehending the burglar, he does not thereby consent to the breaking and entry, and it will be burglary.[49] If, on the

[47] Hunter v. State, 29 Ind. 80; Lanier v. State, 76 Ga. 304; State v. Beal, 37 Ohio St. 108, 41 Am. Rep. 490; State v. McDaniel, 60 N. C. 249.

[48] Ante, p. 264, notes.

[49] Rex v. Bigley, 1 Craw. & D. 202; State v. Covington, 2 Bailey (S. C.) 569; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 364; State

other hand, he takes active steps to aid the intending burglar, as, for instance, where he unlocks the door to admit him, or instructs his servant to do so, his consent prevents the entry from being burglarious.[50] It has also been held that if the owner of a house, or his servant by his authority, instigates a person to break and enter for the purpose of stealing, the latter is not criminally liable.[51]

v. Sneff, 22 Neb. 481, 35 N. W. 219; State v. Abley, 109 Iowa, 61, 80 N. W. 225, 46 L. R. A. 862, 77 Am. St. Rep. 520.

[50] Rex v. Egginton, 2 Leach, 913; Allen v. State, 40 Ala. 334, 91 Am. Dec. 476; Speiden v. State, 3 Tex. App. 157, 30 Am. Rep. 126; 1 Bish. New Cr. Law, § 262, and cases cited. Otherwise where servant acts without authority. State v. Abley, supra.

[51] People v. McCord, 76 Mich. 200, 42 N. W. 1106.

CHAPTER XI.

OFFENSES AGAINST PROPERTY.

LARCENY.

94. Larceny, at common law, is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein.[1]

§§ 94–98. [1] 2 Bish. New Cr. Law, § 758. Mr. Bishop adds: "And perhaps it should be added, for the sake of some advantage to the trespasser,—a question on which the decisions are not harmonious." The following are some of the older definitions: "Larceny, by the common law, is the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another." 3 Co. Inst. 107. "The felonious taking and carrying away of the personal goods of another." 4 Bl. Comm. 229. "The wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 East, P. C. 553.

95. To constitute the crime

(a) The thing taken must be the personal property of another, and therefore

(1) It must be a thing which the law regards as property.

(2) It must be personal, and not real, property.

(3) It must be generally or specially owned by another.

(b) It must be taken

(1) From the actual or constructive possession of the owner.

(2) By trespass.

(c) It must be carried away from the place it occupies, but any removal, however slight, is sufficient.

(d) The intent

(1) Must be to deprive the owner permanently of his property.

(2) It must exist at the time of the taking.

(3) The taking must be without claim of right.

(4) In most jurisdictions the taking need not be lucri causa; that is, for the advantage of the thief. It need never be for his pecuniary advantage.

96. Larceny at common law was divided into

(a) Grand larceny, and

(b) Petit larceny, according to the value of the property stolen, but the distinction has been abolished in many jurisdictions.

97. Larceny, both at common law and by statute, is either

(a) Simple, that is, where there are no aggravating circumstances; or

(b) Compound, that is, where there are such circumstances.

98. Larceny is a felony at common law.

Property That may be Stolen.[2]

As larceny is the taking of the "property" of another, it can only be committed by taking something which the law re-

[2] Coffin, State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785. Grave-clothes, Wonson v. Sayward, 13 Pick. (Mass.) 402, 23 Am. Dec. 691. Dead body not the subject of larceny, 2 East, P. C. 652; nor seaweed not reduced to possession. Reg. v. Clinton, 4 Ir. Com. Law, 6; Com. v. Sampson, 97 Mass. 407.

gards as property, and deems capable of being owned. For this reason animals feræ naturæ cannot be the subject of larceny at common law, for the law does not regard them as property; but once reclaimed, if capable of being reclaimed, or reduced into possession, if valuable when killed, —as animals fit for food or valuable for their fur,—they become property.[3] Thus, deer and other game in the forest, or fish in an open river, cannot be stolen; but if they are killed or caught, or confined in a private park or pond, they become property and the subject of larceny.[4] Animals feræ naturæ, if killed on another's land, and allowed to lie there, would, if fit for food, become the property of the owner of the land. If, therefore, a poacher kills a wild animal or bird on another's preserves, and, leaving it on the premises, abandons it, and afterwards returns and carries it off, he commits larceny; but it is otherwise if he carries it off as soon as he kills it, so that the killing and carrying away may be regarded as one and the same act.[5] The same rule applies

[3] Reg. v. Shickle, 11 Cox. Cr. Cas. 189. Bees in a hive, State v. Murphy, 8 Blackf. (Ind.) 498. Pea fowls, Anon., Y. B. 19 Hen. VIII. 2, pl. 11; Com. v. Beaman, 8 Gray (Mass.) 497. Pigeons, Reg. v. Cheafor, 5 Cox, Cr. Cas. 367. Doves in a dovecot or nest under care of owner, Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348. Tame bird, Haywood v. State, 41 Ark. 479. Oysters planted in public waters, State v. Taylor, 27 N. J. Law, 117, 72 Am. Dec. 347. Otter killed, and valuable for fur, State v. House, 65 N. C. 315, 6 Am. Rep. 744. Hawks were the subject of larceny. "Of some things that be feræ naturæ, being reclaimed, felony may be committed in respect of their noble and generous nature and courage, serving of vitæ solatium of princes and noble and generous persons to make them fitter for great employments, as all kinds of falcons and other hawks, if the party that steals them know they be reclaimed." 3 Co. Inst. 109.

[4] Reg. v. Townley, 12 Cox, Cr. Cas. 59.

[5] Reg. v. Townley, 12 Cox, Cr. Cas. 59; Reg. v. Petch, 14 Cox, Cr. Cas. 116. Post, p. 276.

here as in case of fixtures severed from the freehold, which we shall presently discuss.[6] At common law, certain animals, such as dogs, cats, ferrets, singing birds, and the like, were said to be of so base a nature as to be incapable of becoming property, and cannot be stolen;[7] but all of these rules are greatly modified by statute, both in England and with us. Dogs, it has been held, being made taxable by statute, become property, and therefore the subject of larceny.[8] The property must also be of some value,[9] though it may be the very smallest.[10] A bill, note, or other like instrument is not, at common law, the subject of larceny, because the character of the paper on which it is written as a chattel is deemed to be absorbed in its character as a chose in action;[11] although, if the instrument is invalid, and of no value except as a piece of paper,

[6] See post, p. 275, notes 14–23.

[7] 4 Bl. Comm. 236; Reg. v. Robinson, Bell, Cr. Cas. 34; Rex v. Searing, Russ. & R. 350 (ferret); Ward v State, 48 Ala. 161, 17 Am. Rep. 31 (dog); Warren v. State, 1 G. Greene (Iowa) 106, 111 (coon); Norton v. Ladd, 6 N. H. 203; State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772 (dog); State v. Holder, 81 N. C. 527, 31 Am. Rep. 517 (dog); Findlay v. Bear, 8 Serg. & R. (Pa.) 571 (dog).

[8] Com. v. Hazlewood, 84 Ky. 681, 2 S. W. 489; People v. Maloney, 1 Parker, Cr. R. (N. Y.) 503; People v. Campbell, 4 Parker, Cr. R. (N. Y.) 386; Mullaly v. People, 86 N. Y. 365; State v. Brown, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81; Harrington v. Mills, 11 Kan. 480, 15 Am. Rep. 355. And see Hurley v. State, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916. Contra, see cases cited in preceding note.

[9] Hope v. Com., 9 Metc. (Mass.) 134. Duebill previously paid, State v. Campbell, 103 N. C. 344, 9 S. E. 410.

[10] People v. Wiley, 3 Hill (N. Y.) 194; Payne v. People, 6 Johns. (N. Y.) 103.

[11] 4 Bl. Comm. 234; Reg. v. Watts, 6 Cox, Cr. Cas. 304; Reg. v. Powell, 5 Cox, Cr. Cas. 396; Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; U. S. v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930; Payne v. People, 6 Johns. (N. Y.) 103; State v. Wilson, 3 Brev. (S. C.) 196.

it is the subject of larceny.[12] Nor are charters and instruments of title to real estate the subject of larceny, because the writing is evidence of the right or title, and ceases to have existence as anything else.[13] These rules have been changed in many of the states by statutes declaring choses in action, evidences of debt or contract, or articles of value of any kind, to be property which may be stolen.

Same—Personal Property.

Larceny is the taking of "personal" property; and the crime, therefore, is not committed at common law by taking property which is attached to the soil or freehold, such as doors, window blinds, mantels, pipes, and the like.[14] If a thing attached to the realty is severed, thereby becoming personal property, it may be stolen.[15] Neither ore before it has been mined nor ice before it has been cut is the subject

[12] Reg. v. Perry, 1 Denison, Cr. Cas. 69, 1 Car. & K. 725. See Reg. v. Watts, supra. So of a note which has been paid. Rex v. Vyse, 1 Moody, Cr. Cas. 218. Postage stamps, unissued (under statute) Jolly v. U. S., 170 U. S. 402, 18 Sup. Ct. 624, 42 L. Ed. 1085.

[13] 4 Bl. Comm. 234; Rex v. Westbeer, 2 Strange, 1133. An earlier reason was because they partake of the nature of the land. Rex v. Wody, Y. B. 10 Edw. IV. 14, pl. 9, 10. See Reg. v. Powell, 5 Cox, Cr. Cas. 397; Reg. v. Watts, supra.

[14] Rex v. Westbur, 1 Leach, 14; 2 East, P. C. 596. A key may be stolen, Hoskins v. Tarrence, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129, so, also, chandeliers attached to the freehold, as they remain furniture, and do not become part of the realty, Smith v. Com., 14 Bush (Ky.) 31, 29 Am. Rep. 402. Valves attached to pump and boiler used as a permanent improvement for irrigating purposes, but removable, not part of freehold, Langston v. State, 96 Ala. 44, 11 South. 334; otherwise where they are screwed to pipes attached to the side of a building, Id.

[15] Reg. v. Wortley, 1 Denison, Cr. Cas. 162; People v. Williams, 35 Cal. 671 (ore); State v. Burt, 64 N. C. 619; State v. Berryman, 8 Nev. 262; Holly v. State, 54 Ala. 238. Turpentine after being taken from tree, State v. Moore, 33 N. C. 70.

of larceny; but it is otherwise if the ore has become detached or the ice cut and stored.[16] Where, however, the severance is by a trespasser, who carries the thing away, the taking and carrying away is mere trespass, and not larceny, if the severance and carrying away are one continuous transaction.[17] It was once held that the two acts must be separated by a day in order to make them distinct transactions;[18] but no particular length of time is necessary. It is enough if the two acts do not constitute one transaction.[19] The technical reason why the two acts must be distinct is that, if the thing severed is carried away as part of one continuous transaction, it never comes into the possession of the owner as personal property, and hence there is no taking of personal property out of his possession. It is essential that the thing severed and carried away should come into the intervening possession of the owner. If the trespasser leaves the thing upon the owner's premises, and abandons it, it then comes into the possession of the owner as personal property, and if the trespasser returns and carries it away he is guilty of larceny.[20] But it has been held that merely leaving the thing on the owner's premises does not of itself vest possession in the owner, so as to make the reoccupation by the trespasser larceny. Thus, where trespassers hid the thing on the premises with the intention

[16] People v. Williams, 35 Cal. 671; Ward v. People, 3 Hill (N. Y.) 395; State v. Burt, 64 N. C. 619; State v. Berryman, 8 Nev. 262; Com. v. Steimling, 156 Pa. 400, 27 Atl. 297; Ward v. People, 6 Hill (N. Y.) 144.

[17] 4 Bl. Comm. 232; Reg. v. Townley, 12 Cox, Cr. Cas. 59; State v. Hall, 5 Har. (Del.) 492; State v. Burt, 64 N. C. 619; Jackson v. State, 11 Ohio St. 104; Bradford v. State, 6 Lea (Tenn.) 634; People v. Williams, 35 Cal. 671.

[18] 2 Bish. New Cr. Law, § 766.

[19] See cases generally cited under this paragraph.

[20] Reg. v. Foley, 26 L. R. Ir. 299.

of returning for it, and returned after several hours and carried it away, it was held that the transaction was continuous and did not amount to larceny.[21] Some courts, however, have refused to be bound by these distinctions, and have held that severance and carrying away constituted larceny, although the transaction was in fact continuous.[22] In many states it is by statute made larceny to take and carry away fixtures, growing trees, and other things attached to realty, although the severance and carrying away are one and the same transaction. Illuminating gas and water, when collected for supply, are such property as may be stolen.[23]

Same—Property of Another.

Although, as stated in the black-letter text, the ownership of the stolen property must be in another than the thief,[24] it is not necessary that the owner shall be known.[25] Nor is it necessary that the stealing shall be from the holder of the legal title. The ownership may be special as well as

[21] Reg. v. Townley, 12 Cox, Cr. Cas. 59; Reg. v. Petch, 14 Cox, Cr. Cas. 116. These cases related to rabbits killed and concealed on the premises by poachers, but the same principles are applicable.

[22] Where defendant gathered coal which had been deposited by a stream on the prosecutor's land, sifted the coal, and deposited it and carried it away in a flatboat, he was guilty of larceny. Com. v. Steimling, 156 Pa. 400, 27 Atl. 297.

[23] Ferens v. O'Brien, 11 Q. B. Div. 21; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706; Hutchison v. Com., 82 Pa. 472; Reg. v. White, 6 Cox, Cr. Cas. 213; State v. Wellman, 34 Minn. 221, 25 N. W. 395.

[24] Benton v. State, 21 Tex. App. 554, 2 S. W. 885; Burton v. State (Tex. App.) 1 S. W. 450. Larceny by vendor of the property; the contract of sale must be complete. Love v. State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234. An assignment of his unearned salary by a government employé being void as against public policy, he does not commit larceny by converting it. State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358.

[25] See post, pp. 287–289.

general,[26] as in case of bailment. Thus, property stolen from a bailee may be charged in the indictment to have been his property;[27] property stolen from one who had himself stolen it, as his;[28] and clothing stolen from the body of a dead person, as the property of his executors.[29] Property in the hands of a bailee may be stolen by the general owner; as, for instance, where it is taken with intent to charge the bailee with its value.[30] So property in the possession of a part owner as the bailee of all may be stolen by another part owner, and the ownership may be laid in the bailee.[31] As has already been seen, things which in law are not deemed property and capable of ownership, such as wild animals, dogs, etc., cannot be stolen.[32] At common

[26] Com. v. O'Hara, 10 Gray (Mass.) 469; State v. Mullen, 30 Iowa, 203; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; State v. Gorham, 55 N. H. 152; State v. Furlong, 19 Me. 225; Owen v. State, 6 Humph. (Tenn.) 330; State v. Somerville, 21 Me. 14, 38 Am. Dec. 248; Quinn v. People, 123 Ill. 333, 15 N. E. 46.

[27] Rex v. Bramley, Russ. & R. 478; Reg. v. Webster, 9 Cox, Cr. Cas. 13; Kennedy v. State, 31 Fla. 428, 12 South. 858; State v. McRae, 111 N. C. 665, 16 S. E. 173; State v. Allen, 103 N. C. 433, 9 S. E. 626.

[28] Com. v. Finn, 108 Mass. 466; Ward v. People, 3 Hill (N. Y.) 396.

[29] Hayne's Case, 12 Coke, 113.

[30] 2 East, P. C. 654; Rex v. Bramley, Russ. & R. 478; Palmer v. People, 10 Wend. (N. Y.) 166, 25 Am. Dec. 551; People v. Thompson, 34 Cal. 671; Com. v. Greene, 111 Mass. 392; People v. Wiley, 3 Hill (N. Y.) 194; Com. v. Tobin, 2 Brewst. (Pa.) 570. Or to remove property clandestinely from the rightful possession of one who has a valid lien upon it, People v. Long, 50 Mich. 249, 15 N. W. 105. Retaking property after surrendering it to receiver thereof, State v. Rivers, 60 Iowa, 381, 13 N. W. 73. Larceny by pledgor from pledgee, Bruley v. Rose, 57 Iowa, 651, 11 N. W. 629. Larceny by taking one's own goods which have been levied on under execution, Adams v. State, 45 N. J. Law, 448.

[31] Reg. v. Webster, 9 Cox, Cr. Cas. 13.

[32] Ante, p. 272.

law, husband and wife cannot steal each other's goods, as they are regarded in law as one person.[33] Nor is a third person guilty of larceny if he merely assists a wife to take her husband's goods, provided, however, the wife has not committed, and does not intend to commit, adultery with him. In the latter case he will be guilty of larceny.[34]

The Manner of Taking.

Though larceny is generally regarded as a secret crime, and conveys the idea of stealth, it is not necessary that the taking shall be done secretly. An open taking may constitute the crime if there is the necessary animus furandi, or felonious intent,[35] though, of course, the fact that there was no stealth or attempt at concealment may tend to show the absence of such intent; as, for instance, where the accused claims that he in good faith believed that the property was his own, and that he had a right to take it.[36]

The Trespass in Taking.

To constitute the crime of larceny at common law, it is essential that the thing shall be taken "by trespass." It has

[33] Reg. v. Kenny, 13 Cox, Cr. Cas. 397; Reg. v. Tollett, Car. & M. 112; Rex v. Willis, 1 Moody, Cr. Cas. 375; Lamphier v. State, 70 Ind. 317; Thomas v. Thomas, 51 Ill. 162; State v. Banks, 48 Ind. 197. Where by statute the husband's interest in his wife's goods and chattels is abolished, he may commit larceny by taking them. Beasley v. State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418.

[34] Reg. v. Avery, 8 Cox, Cr. Cas. 184; Reg. v. Thompson, 2 Craw. & D. 491; Rex v. Clark, 1 Moody, Cr. Cas. 376; Rex v. Tolfree, Id. 243; Rex v. Featherstone, 6 Cox, Cr. Cas. 376; People v. Schuyler, 6 Cow. (N. Y.) 572; Reg. v. Flatman, 14 Cox, Cr. Cas. 396. As to consent of wife, see People v. Cole, 43 N. Y. 508. Taking of community property by adulterer, knowing the facts, People v. Swalm, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96.

[35] Post, p. **297.**

[36] State v. Fenn, 41 Conn. 590; State v. Ledford, 67 N. C. 60; McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93.

been said that, as the crime always implies a trespass, a person cannot be held guilty except under such circumstances as would render him liable to damages in an action for trespass to goods.[37] Though a person who appropriates another's goods to his own use may have the intent necessary to make the appropriation larceny, yet, if there is no trespass in taking the goods, the crime is not committed.

A taking may not be a trespass for two reasons aside from the intent and the act of the taker. In the first place, the possession of the goods may have been lawfully obtained by the person who appropriates them, in which case a trespass by him is impossible, so long as he has such possession; and, in the second place, the owner, though in possession, may consent to parting with the "property," and if he does so absolutely, and the consent is as broad as the taking, a trespass is not committed. We must therefore consider the question of possession, and the mental attitude of the owner. In doing so, the difference between the meaning of the terms "possession," "custody," and "property" must be kept in mind. A person has the "custody" of a thing as distinguished from the "possession," where, as in case of a servant's custody of his master's goods, he merely has the care and charge of them for the master, who retains the right to control them, and who therefore retains constructive possession. Constructive possession includes not only the possession which a master has of goods in the custody of a servant on the master's account; but it includes the purely fictitious possession which the owner of goods is supposed to have, although they are in reality possessed by no one at all.[38] "Property" means ownership.

[37] Reg. v. Smith, 2 Denison, Cr. Cas. 449. And see the cases hereinafter cited.

[38] See Steph. Dig. Cr. Law, Append. note xvii.

Same—Possession Obtained without Consent.

In order that a thing may be stolen, it is essential that possession be obtained unlawfully; that is, against the will or without the consent of the owner. Where a thing is taken out of the actual possession of the owner, and there is nothing to indicate his consent, the trespass or wrongful disturbance of the owner's possession is clear. Thus, a person who picks up goods in a shop, and secretly appropriates them,[39] or who inserts a metal disk in an automatic slot machine and thereby obtains something of value, which the owner intended to part with only to one who placed a coin in the slot, takes the goods by trespass, and is guilty of larceny.[40] Again, if delivery is obtained by putting the owner in fear,—as by threats or intimidation,—there is no consent, and the taking is by trespass.[41]

Same—Larceny by Bailee.

A bailee who is lawfully in possession of a thing, and who appropriates it to his own use, does not commit larceny, because his possession was lawfully obtained;[42] although he may be guilty of embezzlement under the statutes enacted

[39] Mitchum v. State, 45 Ala. 29. In this case defendant took from a tobacconist's counter a box of matches placed there for the use of customers, and was held guilty of larceny. The court said: "The owner had not abandoned his right to them. They could only be appropriated in a particular manner, and in a very limited quantity, with his consent. Taking them by the box full without felonious intent would have been a trespass, and with it a larceny." If there has been abandonment, there is no larceny. Reg. v. Edwards, 13 Cox, Cr. Cas. 384.

[40] Reg. v. Hands, 16 Cox, Cr. Cas. 188.

[41] Reg. v. McGrath, L. R. 1 Cr. Cas. 205, 11 Cox, Cr. Cas. 347; Reg. v. Lovell, 8 Q. B. Div. 185 (extorting excessive charge by threats); Reg. v. Hazell, 11 Cox, Cr. Cas. 597.

[42] Raven's Case, J. Kelyng, 24; Leigh's Case, 2 East, P. C. 694; Rex v. Banks, Russ. & R. 441; Reg. v. Thristle, 3 Cox, Cr. Cas. 573

to fill this gap in the common law.[43] On the other hand, if a person obtains possession of goods or money by trick or fraud, or under false pretense of a bailment, with intent to appropriate the thing to his own use, and the owner intends to part with the possession only, and not with the property, the possession is obtained unlawfully, and the subsequent appropriation in pursuance of the original intent is larceny.[44] Again, a bailee, although he obtain possession lawfully, may be guilty of larceny if he first commits a breach of trust, whereby he is deemed to terminate the bailment,—as where a carrier breaks bulk, and afterwards abstracts part of the goods intrusted to him;[45] or a miller separates from

(watch given watchmaker to repair and appropriated); State v. England, 53 N. C. 399, 80 Am. Dec. 334; State v. Fann, 65 N. C. 317.

[43] Post, p. 307.

[44] Where a gypsy, under pretense of raising spirits and recovering property, induced a woman to give her money, promising to return it, it was held that, if it was a mere trick to induce the woman to part with possession of the money, with no intent to return it, it was larceny. Reg. v. Bunce, 1 Fost. & F. 523. Where defendant obtained a watch and money from a woman by falsely pretending her husband was under arrest, and had sent for money, defendant to pawn the watch and give the money and ticket to the husband, it was held that, if the taking was with felonious intent, it was larceny. Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474. Obtaining goods on pretense of hiring or other bailment with intent to steal. Rex v. Pear, 2 East, P. C. 685; People v. Smith, 23 Cal. 280; Starkie v. Com., 7 Leigh (Va.) 752 (borrowing); State v. Gorman, 2 Nott & McC. (S. C.) 90, 10 Am. Dec. 576; State v. Lindenthall, 5 Rich. Law (S. C.) 237, 57 Am. Dec. 743. See, also, Com. v. Barry, 124 Mass. 325; Com. v. Lannan, 153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. Rep. 629; Com. v. Flynn, 167 Mass. 460, 45 N. E. 924, 57 Am. St. Rep. 472; Doss v. People, 158 Ill. 660, 41 N. E. 1093, 49 Am. St. Rep. 180 (obtaining money on pretense of bet); Crum v. State, 148 Ind. 401, 47 N. E. 833 ("green goods").

[45] Nichols v. People, 17 N. Y. 114; Com. v. Brown, 4 Mass. 580; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Reg. v. Poyser,

the rest part of the grain sent to be ground,[46] thereby determining the bailment, and appropriates that part. It must be admitted that these cases, as do many others involving the question whether larceny is or is not committed, rest upon a highly artificial distinction. "The law has resorted to some astuteness to get rid of the difficulties that might arise in the case of a wrongful dealing with one or more of several articles, all of which, when intrusted, had been contained in one bulk." [47]

The appropriation must be during the bailment, and while the bailee lawfully has possession, or the crime will be larceny, and not embezzlement. Thus, the teller of a bank, if he appropriates money of which he has charge during the business hours, does not commit larceny, as he is then intrusted with the possession; but it is otherwise if he takes the money from the vault after business hours, for then the possession is in the bank.[48] So, also, a clerk intrusted with goods to sell and deal with at his discretion, during business hours only, is guilty of larceny if he enters the store after it has been closed and takes them; whereas, if he appropriates them during business hours, he commits embezzlement only; [49] and the hirer of a horse, if he sells it after termination of the bailment, instead of returning it, commits larceny.[50]

5 Cox, Cr. Cas. 241, 2 Denison, Cr. Cas. 233; Rex v. Brazier, Russ. & R. 337. When bulk not broken, Rex v. Madox, Id. 92; Rex v. Fletcher, 4 Car. & P. 545; Rex v. Pratley, 5 Car. & P. 533.

46 Com. v. James, 1 Pick (Mass.) 375; Cartwright v. Green, 8 Ves. 405. So where one who is intrusted with trunk opens it, and takes money therefrom, Robinson v. State, 1 Cold. (Tenn.) 120, 78 Am. Dec. 487.

47 Per Lord Campbell, C. J., in Reg. v. Poyser, supra.

48 Com. v. Barry, 116 Mass. 1.

49 Com. v. Davis, 104 Mass. 548.

50 Reg. v. Haigh, 7 Cox, Cr. Cas. 403.

Same—Custody not Possession—Larceny by Servant.

A thing need not be in the owner's actual possession in order that a trespass may be committed in taking it. His possession may be constructive.[51] If a master delivers goods to his servant or other agent merely to keep or use for him, and not by way of bailment, he parts with the custody only, and not the possession. He has constructive possession by his servant. A person, therefore, who takes the goods from the servant, takes them from the possession of the master, and commits a larceny from the master, and not from the servant. The servant himself, also, if he converts the goods to his own use, takes them from the constructive possession of his master, and is guilty of larceny.[52] He is the custodian of the goods, and not a bailee.

A servant, however, may become a bailee, instead of a mere custodian. Thus, where goods are delivered to a servant by a third person, to be delivered to his master, he is merely a bailee until the goods have reached their destination, or something more has happened to reduce him to a mere custodian; and he does not commit larceny if in the meantime he appropriates the goods to his own use; for the

[51] A horse on its accustomed range is in the owner's constructive possession. Burton v. State (Tex. App.) 1 S. W. 450. Client's constructive possession of his property in the hands of his attorney. Com. v. Lannan, 153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. Rep. 629.

[52] 2 East, P. C. 564; 2 Hale, P. C. 506; Anon., J. Kelyng, 35; Rex v. Bass, 1 Leach, 251; Com. v. O'Malley, 97 Mass. 584; Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767; Marcus v. State, 26 Ind. 101; State v. Jarvis, 63 N. C. 556; People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; Crocheron v. State, 86 Ala. 64, 5 South. 649, 11 Am. St. Rep. 18; People v. Belden, 37 Cal. 51; People v. Perini, 94 Cal. 573, 29 Pac. 1027; Jenkins v. State, 62 Wis. 49, 21 N. W. 232; Rex v. Murray, 1 Moody, Cr. Cas. 276; Jones v. State, 59 Ind. 229.

master, until the goods are at least constructively received by him, has no possession, either actual or constructive.[53] If, on the other hand, the goods, when received by the servant from a third person, are delivered to him in a place appropriated by his master for their reception,—as a cart, when the servant is sent with a cart to fetch the goods,—they then come at once into the master's possession, and a subsequent taking by the servant with intent to steal is larceny.[54]

This distinction between custody and possession is of the utmost importance, for it is often very difficult to determine whether the crime is larceny or embezzlement, each particular case depending upon the peculiar circumstances. To illustrate the doctrine: where a third person hands a clerk money to pay a bill which he owes the clerk's employer, and the clerk, instead of putting the money into his employer's safe or other proper place, puts it into his own pocket, and appropriates it, or hides it on the premises, and afterwards carries it off, he does not commit larceny; for, as the money has not reached its destination, but is merely in transit, the master has not obtained possession, either actual or constructive. If, however, the clerk puts the moneys in the safe, it is in his employer's constructive possession; and if he takes it out again, and converts it, he is guilty of larceny.[55] If it is not the duty of the clerk to put the money

[53] Com. v. King, 9 Cush. (Mass.) 284; Reg. v. Bazely, 2 Leach, 835; Reg. v. Masters, 1 Denison, Cr. Cas. 332. "This distinction is not very satisfactory, but is due to historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offense." Per Holmes, J., in Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. Rep. 560.

[54] Reg. v. Watts, 4 Cox, Cr. Cas. 336; Reg. v. Reed, 6 Cox, Cr. Cas. 284 (servant sent with cart for coals); Reg. v. Norval, 1 Cox, Cr. Cas. 95 (goods put in master's cart).

[55] Where a clerk in a store received cash, and placed it in the

in the safe, but he is required to keep it on his person for his master, then, as soon as he receives the money, it has reached its ultimate destination, and he will be guilty if he appropriates it, instead of holding it for his master. If a master gives his servant a check to take to the bank and get cashed, he has mere custody of the check itself, and commits larceny if he appropriates it; but if he cashes the check, and appropriates the money, he commits embezzlement only, as the money has never been in the master's possession.

Same—Delivery on Condition.

The custody, as distinguished from the possession, may be parted with to others than servants. If a thing is delivered by the owner merely for a temporary purpose and upon condition, and the other keeps the thing without fulfilling the condition, this is larceny, because the owner consents merely to transfer the custody, and not the possession. Thus, where the maker of a note, on which he has made a part payment, takes it into his hands for the purpose of indorsing the payment, he has merely the custody of the note, and is guilty of larceny if he converts it.[56] And so, where a salesman hands a customer goods to examine with a view to purchase, or a person hands another money to count and return part, or a note to examine, there is no change of possession in the eye of the law, and, if the person runs off with the thing, he is guilty of larceny.[57] So, where goods

proper drawer of the cash register, but with the intention of appropriating it, and did not register the sale, and instantly picked the money out, he was guilty of embezzlement, and not larceny. Com. v. Ryan, supra.

[56] People v. Call, 1 Denio (N. Y.) 120.

[57] Chissers' Case, T. Raym. 275 (snatching cravats handed over counter for examination); Reg. v. Thompson, 9 Cox, Cr. Cas. 244; People v. Call, 1 Denio (N. Y.) 120; Com. v. Wilde, 5 Gray (Mass.)

are sold for cash, and there is a delivery conditional upon receiving immediate payment, although the property passes, subject to the seller's lien, the seller does not part with possession, and relinquish his lien, unless payment is made; and if the buyer, without making payment, runs off with the goods, he is guilty of larceny.[58] Conversely, if in a cash sale the buyer pays conditionally upon receiving at once the thing sold, and if the seller, without delivering it, runs off with the money, the seller is guilty of larceny. So, if a bill or coin is given in payment, and change is to be returned, the delivery is conditional, and the person handing over the money does not part with the possession until the change is returned.[59]

Same—Larceny by Finder.

Merely taking possession of lost goods is not taking possession unlawfully. If a person finds goods that have been actually lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny; but it is otherwise if he takes them with the like intent, though lost, or reasonably supposed to be lost, knowing, or having reasonable means of knowing or ascertaining, who the owner is.[60] As will be seen when we come to consider the ques-

83, 66 Am. Dec. 350; Com. v. O'Malley, 97 Mass. 584 (handing money to count and retain part as loan); Ellis v. People, 21 How. Prac. (N. Y.) 359; State v. Fenn, 41 Conn. 590; Com. v. Lester, 129 Mass. 101; People v. Johnson, 91 Cal. 265, 27 Pac. 663 (placing money on table that defendant might illustrate manner of drawings of Louisiana lottery); Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; Levy v. State, 79 Ala. 259.

[58] Reg. v. Slowly, 12 Cox, Cr. Cas. 269.

[59] Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435; State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455.

[60] Reg. v. Thurborn, 2 Car. & K. 831, 1 Denison, Cr. Cas. 387; Reg. v. York, 2 Car. & K. 841, 1 Denison, Cr. Cas. 335; 2 East, P. C. 663;

tion of intent, this belief and intention must exist at the time the goods are found; for, if the original possession is innocent, a subsequent change of mind and appropriation with knowledge of the true ownership do not constitute larceny.[61] The finder of lost property cannot keep it unless he reasonably believes that the owner cannot be found. If, therefore, there are marks on the property, indicating where the owner may be found, or if the place or the circumstances are such as to point out a probable owner, the finder must regard them, and return the property. He cannot close his eyes, and keep it, merely because he does not know the owner.[62] If, however, there are no marks on the property, and the circumstances are not such as to reasonably put the finder on inquiry as to the owner's identity, he is not bound to seek for means to discover him.[63]

1 Hale, P. C. 506; Hunt's Case, 13 Grat. (Va.) 761, 70 Am. Dec. 443; Tanner v. Com., 14 Grat. (Va.) 635; Com. v. Titus, 116 Mass. 42. 17 Am. Rep. 138; State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; State v. Ferguson, 2 McMul. (S. C.) 502; People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Tyler v. People, Breese (Ill.) 293, 12 Am. Dec. 176; People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; State v. Conway, 18 Mo. 321; Ransom v. State, 22 Conn. 153; State v. Boyd, 36 Minn. 538, 32 N. W. 780; McLaren v. State, 21 Tex. App. 513, 2 S. W. 858; People v. Seaton, 60 Hun, 15 N. Y. Supp. 270; Perrin v. Com., 87 Va. 554, 13 S. E. 76; Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182; Wolfington v. State, 53 Ind. 343. Obtaining possession under pretense of being the owner, State v. Farrow, 61 N. C. 161, 93 Am. Dec. 587; Quinn v. People, 123 Ill. 333, 15 N. E. 46.

61 Reg. v. Thurborn, supra; Reg. v. Preston, 5 Cox, Cr. Cas. 390. Post, p. 303.

62 Lane v. People, 5 Gilman (Ill.) 305; State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; People v. McGarren, 17 Wend. (N. Y.) 460; Reg. v. Scully, 1 Cox, Cr. Cas. 189; State v. Bolander, 71 Iowa, 706,

63 People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297. But see Reg. v. Coffin, 2 Cox, Cr. Cas. 44.

Same—Property Merely Mislaid.

The law makes a distinction between property that is lost and property that is merely mislaid by the owner. The finder of property which he knows to be mislaid or left by mistake is guilty of larceny if he takes it with intent to appropriate it. The distinction is that there are circumstances of identification. If a passenger leaves property in a railroad car or a carriage, it is not lost, but merely mislaid; and if the carrier, or an employé of the carrier, or any other person, appropriates it to his own use, instead of turning it over to the proper person, to await the probable inquiry of the owner, he is guilty of larceny.[64] So, also, where a merchant or clerk, or even a stranger, appropriates property which a customer has left in a shop or store by mistake,[65] or where the purchaser of a secretary at auction finds money therein which was not intended to be sold, and appropriates it,[66] he commits larceny. Property found in a house by a servant or a stranger is not lost property; and if it belongs to the occupant of the house, and the finder appropriates it to his own use without inquiry, he is guilty of larceny.[67]

Same—Consent of Owner to Part with "Property" as Well as Possession.

To constitute a trespass, it is not only essential that the thing shall be taken from the actual or constructive pos-

29 N. W. 602; Kennedy v. Woodrow, 6 Houst. (Del.) 46; Stepp v. State, 31 Tex. Cr. R. 349, 20 S. W. 753.

[64] 2 East, P. C. 664; Reg. v. Pierce, 6 Cox, Cr. Cas. 117.

[65] Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644; Reg. v. West, Dears. Cr. Cas. 402; People v. McGarren, 17 Wend. (N. Y.) 460; Reg. v. Moore, 8 Cox, Cr. Cas. 416; State v. McCann, 19 Mo. 249.

[66] Merry v. Green, 7 Mees. & W. 623.

[67] Reg. v. Kerr, 8 Car. & P. 176; Roberts v. State, 83 Ga. 369, 9 S. E. 675.

session of the owner, but it must also be taken without his consent to pass the property.

We have already explained the effect of voluntarily parting with the possession, and have seen that, if a person lawfully obtains possession with the owner's consent, he cannot, while in lawful possession, commit larceny by appropriating the thing; but that, if he obtains possession fraudulently with intent to appropriate the thing to his own use, he commits larceny by subsequently carrying out his intention. In such case the appropriation is without the owner's consent. This is the law where the consent is to the change of possession only.[68]

The law, however, makes a distinction where the owner intends to part with "the property," or ownership, as well as the possession. Where the owner of goods delivers possession, intending to part absolutely with the ownership, there can be no larceny, whatever may be the intent of the taker.[69] In such case the appropriation is with the owner's consent. The fact that the possession is obtained fraudulently, and with intent to appropriate the goods, is altogether immaterial. Thus, a person who, by false and fraudulent representations, induces another to give him a thing, or to sell and deliver goods on credit, does not commit larceny;[70] though, as will presently be seen, he may be

[68] Ante, p. 281.

[69] Atkinson's Case, 2 East, P. C. 673 (obtaining money as loan by false pretense); Rex v. Parkes, 2 Leach, 614; Kellogg v. State, 26 Ohio St. 15. Where defendant pretended to drop three shillings in a purse, and really dropped half pence, and thereby induced a man to give a shilling for the purse and contents, it was not larceny, since the man intended to part with the property. Reg. v. Solomons, 17 Cox, Cr. Cas. 93. People v. Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102. Parting with property to shield one's self from prosecution for crime, Haley v. State, 49 Ark. 147, 4 S. W. 746.

[70] Ross v. People, 5 Hill (N. Y.) 294; Rex v. Harvey, 1 Leach, 467;

guilty of cheating at common law, or of obtaining goods under false pretenses, in violation of statutes enacted partly to supply this defect in the common law.

It necessarily follows from what has been said that where possession of goods is obtained by fraud or trick from a servant or other agent of the owner, who delivers with intent to part with the ownership, and the servant has such authority, his act has the same effect as his master's, and there is no larceny; but it is otherwise if the servant or agent has no authority to transfer the ownership.[71]

There are apparent exceptions to the rule that there can

Rex v. Adams, 1 Denison, Cr. Cas. 38, Russ. & R. 225; Haley v. State, 49 Ark. 147, 4 S. W. 746; Com. v. Barry, 125 Mass. 390; Lewer v. Com., 15 Serg. & R. (Pa.) 93. Pledge delivered up in exchange for package falsely represented to contain diamonds, Rex v. Jackson, 1 Moody, Cr. Cas. 119. Borrowing money, and giving as security bag falsely represented to contain gold, Kellogg v. State, 26 Ohio St. 15. It is otherwise if the sale is on credit, the title to remain in the vendor until payment. People v. Raschke, 73 Cal. 378, 15 Pac. 13. One who obtains goods by pretending to be the purchasing agent of another to whom they are charged commits larceny. Harris v. State, 81 Ga. 758, 7 S. E. 689, 12 Am. St. Rep. 355.

[71] Com. v. Collins, 12 Allen (Mass.) 181; Rex v. Longstreeth, 1 Moody, Cr. Cas. 137; Reg. v. Hornby, 1 Car. & K. 305; Reg v. Sheppard, 9 Car. & P. 121; Rex v. Jackson, 1 Moody, Cr. Cas. 119; Com. v. Cruikshank, 138 Pa. 194, 20 Atl. 937. Obtaining goods from clerk by falsely representing that owner has consented, Com. v. Wilde, 5 Gray (Mass.) 83, 66 Am. Dec. 350. Obtaining property from owner's minor son, People v. Camp, 56 Mich. 548, 23 N. W. 216. Where defendant induced a servant in care of a storehouse, and authorized to deliver only on the order of his master or C., to give him wheat, falsely representing he had been sent by C., it was larceny. Reg. v. Robins, Dears. Cr. Cas. 418. See, also, State v. McCartey, 17 Minn. 76 (Gil. 54). Where a forged order was presented at a bank, and the cashier paid it, it was not larceny, since the cashier had authority to pass the property. Reg. v. Prince, L. R. 1 Cr. Cas. 150.

be no larceny where the owner intends to part with the property. Thus, as we have seen,[72] if a merchant hands a customer goods which he has sold for cash, expecting to receive the money before the goods are taken away, and the customer, instead of paying, runs off with the goods, he commits larceny, notwithstanding the merchant may intend to part with the property.[73] So, also, if a customer, in paying for goods, hands the merchant more money than is due, expecting to receive change, and the merchant appropriates the entire amount, or if any person who receives money for which he is to give change appropriates it, and refuses to give the change, he is guilty of larceny.[74] In most of these cases, however, the property is only parted with conditionally, if at all. Moreover, in most of these cases the delivery is conditional, and the owner, even if he parts with the property, does not part with the possession unless the condition is fulfilled. The transfer of the property, like the delivery of possession, may be subject to a condition, and, if the condition is not performed, an appropriation of the goods is larceny, notwithstanding delivery of possession.[75]

[72] Ante, p. 286.

[73] Reg. v. Slowly, 12 Cox, Cr. Cas. 269; Reg. v. Cohen, 2 Denison, Cr. Cas. 249; Rex v. Campbell, 1 Moody, Cr. Cas. 179; Rex v. Gilbert, Id. 185; Rex v. Sharpless, 1 Leach, 92; Rex v. Pratt, 1 Moody, Cr. Cas. 250; Reg. v. Thompson, 32 Law J. M. Cas. 53; Blunt v. Com., 4 Leigh (Va.) 689, 26 Am. Dec. 341; State v. Hall, 76 Iowa, 85, 40 N. W. 107, 14 Am. St. Rep. 204. Giving worthless check on purchase, Shipply v. People, 86 N. Y. 375. Contra, where sale is on credit. Rex v. Harvey, 1 Leach, 467. And see ante, note **57.**

[74] Reg. v. Bird, 12 Cox, Cr. Cas. 257; Walters v. State, 17 Tex. App. 226, 50 Am. Rep. 128; State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435; Com. v. Eichelberger, 119 Pa. 254, 13 Atl. 422, 4 Am. St. Rep. 642.

[75] Where a man deposited money with a pretended bookmaker at a race, who decamped, it was held larceny, since the owner did not intend to part with the property in the money except on condition

A person does not consent to his property being taken merely by negligently or purposely leaving it exposed, or failing to resist the taking, even though he may know that another intends to come and steal it; but if he does consent to the taking, though only for the purpose of entrapping and prosecuting the intending thief, his consent will prevent the taking from being larceny; and it is immaterial in such case that the person taking the property does not know that the owner consents.[76]

Same—Delivery by Mistake.

Where the delivery of goods or money, though intentional, is by mistake, if the person receiving the goods or money takes them with knowledge of the mistake and with intent to appropriate, he commits larceny. These cases are to be distinguished from those where property is obtained by false pretenses, because in those cases the owner actually intends the property to pass, whereas when he delivers by mistake he has no such intention. The question is frequently presented where a person, intending to make a payment, by mistake pays more than the amount due. If the person receiving the money is aware of the mistake when he receives it, and then has a guilty intent or animus furandi, he is guilty of larceny.[77] On the other hand, as in the case

that a bona fide bet was made. Reg. v. Buckmaster, 16 Cox, Cr. Cas. 339. Where a man bought a horse, and paid £8 on account, the balance to be paid on delivery, and the seller never intended to deliver the horse, it was held larceny, since the buyer did not intend to part with the property in the money except on condition of completion of the transaction. Reg. v. Russett [1892] 2 Q. B. 312.

[76] Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295; Rex v. Headge, 2 Leach, 1033; Reg. v. Lawrance, 4 Cox, Cr. Cas. 438; Pigg v. State, 43 Tex. 108; Conner v. State, 24 Tex. App. 245, 6 S. W. 138. Feigning drunken slumber, no consent, People v. Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238.

[77] Reg. v. Middleton, L. R. 2 Cr. Cas. 38; Wolfstein v. People, 6

of a finder, if the original taking is lawful, subsequent appropriation with knowledge is not enough. If the person to whom the money is paid does not discover the mistake until afterwards, appropriation at that time is not larceny.[78]

The Asportation or Carrying Away.

To constitute larceny, it is essential that the thing taken shall be removed from the place it occupies, but the slightest removal will suffice. It is sufficient if the thing is reduced to the thief's absolute control, even for an instant.[79] The

Hun (N. Y.) 121. And see cases cited in next succeeding note. In Reg. v. Middleton, supra, the depositor in a post-office savings bank, in which 11 shillings stood to his credit, gave notice to withdraw 10 shillings. A warrant was issued, and a letter of advice sent to pay him 10 shillings. He handed in the warrant, and the clerk, who referred by mistake to another letter of advice for a larger sum, placed that sum on the counter, entered it in the depositor's book, and the depositor took it, having, as the jury found, animus furandi, and knowing the money to be the postmaster general's. It was held, by a majority of the court, to be larceny. See post, p. 297.

[78] Rex v. Mucklow, 1 Moody, Cr. Cas. 160 (letter delivered to wrong person of same name); Reg. v. Flowers, 16 Cox, Cr. Cas. 33 (payment in excess of wages); Bailey v. State, 58 Ala. 414 (ten dollar bill given for dollar bill). Contra: Reg. v. Ashwell, 16 Cox, Cr. Cas. 1 (but distinguished in Reg. v. Flowers, supra); State v. Ducker, 8 Or. 394, 34 Am. Rep. 590. And see Wolfstein v. People, supra.

[79] Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; Gettinger v. State, 13 Neb. 308, 14 N. W. 403; State v. Higgins, 88 Mo. 354. Taking wheat from granary, and putting it into sacks, State v. Hecox, 83 Mo. 531. Removing grain from the owner's garner, in a mill, into the garner of the accused, adjoining it, State v. Craige, 89 N. C. 475, 45 Am. Rep. 698. Taking sheets from bed, and carrying them into the hall, 3 Inst. 108; 1 Hale, P. C. 507, 508. Removing bag from one end of a wagon to the other, Coslet's Case, 1 Leach, 236. Snatching an earring from a lady's ear, but dropping it in her hair,

immediate dropping or return of the property is no defense.[80] It is not larceny to attempt to take property which cannot be removed because it is fastened by a chain, or because the owner holds on to it;[81] but it has been held a sufficient asportation where a bag was merely lifted from the space it occupied, and immediately dropped on detection,[82] and where a sword was partly lifted out of its scabbard.[83] So, also, there is a sufficient removal to constitute larceny where property is lifted from a person's pocket, or from a drawer, though, before it is entirely removed from the pocket or drawer, the thief is detected, and drops it.[84] In all of these cases the property was entirely removed from the place it occupied, though the removal was slight, and the thief acquired absolute control. On the other hand, it has been held insufficient where a bale was merely set up on end, and cut open, but nothing was taken out of it,[85]

Lapier's Case, 1 Leach, 320. Removing money drawer from a safe to the floor, State v. Green, 81 N. C. 560.

[80] Simon's Case, Kel. J. 31; Georgia v. Kepford, 45 Iowa, 48; Eckels v. State, 20 Ohio St. 508. Abandoning horse after taking it, State v. Davis, 38 N. J. Law, 176, 20 Am. Dec. 367. It is otherwise, if an animal is enticed a short way on the owner's premises, and abandoned before coming into the intending thief's control. Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67. But see, on this point, State v. Gazell, 30 Mo. 92, and 3 Inst. 109.

[81] 2 East, P. C. 556; 1 Hale, P. C. 508; People v. Meyer, 75 Cal. 383, 17 Pac. 431.

[82] Rex v. Walsh, 1 Moody, Cr. Cas. 14.

[83] 2 Russ. Crimes, 153.

[84] Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; Com. v. Luckis, 99 Mass. 431, 96 Am. Dec. 769; Eckels v. State, 20 Ohio St. 508; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; Rex v. Thompson, 1 Moody, Cr. Cas. 78; Reg. v. Simpson, 6 Cox, Cr. Cas. 422.

[85] Cherry's Case, 2 East, P. C. 556.

and where a barrel of turpentine was merely upset.[86] Merely to kill or trap an animal, without carrying it away, has frequently been held not to be a sufficient asportation to constitute larceny,[87] but it is otherwise if, after the animal is killed, it is removed to another place.[88] The asportation need not be by hand nor by the use of any personal force. An animal may be stolen by being enticed away by food.[89] Tapping a pipe, and taking gas or water therefrom, may be larceny.[90] It has also been held larceny to obtain property from a slot machine by dropping into the slot a piece of metal other than money.[91] The asportation may be effected by means of an innocent human agency.[92] Where a person

[86] State v. Jones, 65 N. C. 395.

[87] State v. Seagler, 1 Rich. Law (S. C.) 30, 42 Am. Dec. 404; Ward v. State, 48 Ala. 161, 17 Am. Rep. 31; State v. Wisdom, 8 Port. (Ala.) 511; People v. Murphy, 47 Cal. 103; Wolf v. State, 41 Ala. 412; Williams v. State, 63 Miss. 58. Shooting and wounding animal, Minter v. State, 26 Tex. App. 217, 9 S. W. 561. Molton v. State, 105 Ala. 18, 16 South. 795, 53 Am. St. Rep. 97.

[88] 2 East, P. C. 617; State v. Alexander, 74 N. C. 232; Lundy v. State, 60 Ga. 143; Rex v. Hogan, 1 Craw. & D. 366; Rex v. Clay, Russ. & R. 387.

[89] State v. Wisdom, 8 Port. (Ala.) 511; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67; State v. Whyte, 2 Nott & McC. (S. C.) 174.

[90] Reg. v. White, 6 Cox, Cr. Cas. 213, 3 Car. & K. 363; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706; State v. Wellman, 34 Minn. 221, 25 N. W. 395.

[91] Reg. v. Hands, 16 Cox, Cr. Cas. 188.

[92] Where, at a railway station, defendant changed the checks upon his own and complainant's trunks, which had been previously checked, thereby causing complainant's trunk to be carried out of the state to the destination designated by the changed check, where defendant received it, he was guilty of larceny. Lord, J., said: "As soon as the trunk was placed on board the cars, checked, with the corresponding check in the possession of the defendant, * * * the trunk and its contents were in the possession and control of the defendant. * * * Nor is the time when the actual manual pos-

fraudulently points out another's property as his own, and sells it, and the purchaser takes it away, this is held a taking and carrying away by the seller.[93] We have already seen that a person who procures an innocent third person, a child, for instance, to steal property for him, is himself guilty of the larceny, as a principal in the first degree.[94]

The Intent.

In addition to the taking and removal of the thing by trespass, there must be an intent to deprive the owner permanently of his property therein, and the intent must exist at the time of the taking. This is absolutely essential.[95] The

session came into the hands of the partles important, they having all the time the constructive possession, and the real control of it." Com. v. Barry, 125 Mass. 390. Causing hostler at inn to lead out horse. Rex v. Pitman, 2 Car. & P. 423.

[93] Dale v. State, 32 Tex. Cr. R. 78, 22 S. W. 49; Doss v. State, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618. And see Wampler v. State, 28 Tex. App. 352, 13 S. W. 144. But see, contra, People v. Gillis, 6 Utah, 84, 21 Pac. 404.

[94] Ante, p. 101.

[95] Reg. v. Holloway, 3 Cox, Cr. Cas. 241, 2 Car. & K. 942; Rex v. Dickinson, Russ. & R. 420; State v. Ledford, 67 N. C. 60; Cain v. State, 21 Tex. App. 662, 2 S. W. 888; Johnson v. State, 36 Tex. 375; Bryant v. State, 25 Tex. App. 751, 8 S. W. 937; Mead v. State, 25 Neb. 444, 41 N. W. 277; Ross v. Com. (Ky.) 20 S. W. 214; Phelps v. People, 55 Ill. 334. But see Reg. v. Bucham, 5 Cox, Cr. Cas. 181; Welker v. Butler. 15 Ill. App. 209. Where a workman in a tannery was paid according to the number of skins he dressed, and took dressed skins and handed them in in order to be paid as if he had dressed them, it was not larceny. Reg. v. Holloway, supra. Contra, Fort v. State, 82 Ala. 50, 2 South. 477. Taking property without felonious intent, and negligently losing it, is not larceny. Billard v. State, 30 Tex. 367, 94 Am. Dec. 317. Taking property of drunken man, discarded by him, in order to preserve it for him, not larceny. State v. Gilmer, 97 N. C. 429, 1 S. E. 491. Taking property by mistake not larceny. Donahoe v. State, 23 Tex. App. 457, 5 S. W. 245; White v. State, 23 Tex. App. 643, 5 S. W. 164; Criswell v. State, 24

text-books, and the judges in their decisions, speak of the necessity of a "felonious intent," or the "animus furandi," but by these terms nothing more nor less is meant than this intent. To take another's property for temporary use, without his consent, as, for instance, to take another's horse from his stable to ride a short distance, and then return it, would be a trespass, but not larceny.[96] But, although the intent must be to deprive permanently, it is immaterial that the taker intends to return if he takes with intent to do an act the effect of which will be to put it out of his power to return. To take goods and pawn them, though the thief may intend to redeem them and return them to the owner,[97] or to take a railroad ticket to use, though with the intention of returning it,[98] is larceny. It is also larceny to take another's property with intent to sell it back to him, or to apply it on a debt due to him from the thief, or to hold it for a reward, or to induce him to sell so as to purchase it at a reduced price, for this is in effect to deprive him of it.[99]

Tex. App. 606, 7 S. W. 337. One who sells a borrowed horse, and takes it from the buyer, intending to return it to the lender, does not commit larceny. Gooch v. State, 60 Ark. 5, 28 S. W. 510. See, also, ante, p. 292.

[98] Schultz v. State, 30 Tex. App. 94, 16 S. W. 756; State v. South, 28 N. J. Law, 28, 74 Am. Dec. 250; Rex v. Phillips, 2 East, P. C. 662; Rex v. Crump, 1 Car. & P. 658; State v. York, 5 Har. (Del.) 493; Reg. v. Addis, 1 Cox, Cr. Cas. 78. Taking horse to ride short distance, and then turning it loose, to stray back, held larceny. State v. Ward, 19 Nev. 297, 10 Pac. 133. Contra, Umphrey v. State, 63 Ind. 223.

[97] Reg. v. Phetheon, 9 Car. & P. 552; Reg. v. Medland, 5 Cox, Cr. Cas. 292; Reg. v. Tribilcock, 7 Cox, Cr. Cas. 408.

[98] Reg. v. Beecham, 5 Cox, Cr. Cas. 181.

[99] Reg. v. Hall, 3 Cox, Cr. Cas. 245, 2 Car. & K. 947; Reg. v. Spurgeon, 2 Cox, Cr. Cas. 102; Com. v. Stebbins, 8 Gray (Mass.) 422; Com. v. Mason, 105 Mass. 163, 166, 7 Am. Rep. 507; Berry v.

So, also, where a person has the legal possession of property, as bailee or otherwise, the owner may commit larceny by taking it from him, with intent to charge him with its value.[100] The existence of this intent must in many cases be inferred from the circumstances. Thus, if a person secretly takes property, hides it, and denies that he knows anything about it, the intent to appropriate it to his own use may well be inferred; but if he takes it openly, and returns it, this would tend to show an innocent purpose.[101] Where the necessary intent exists at the time the property is taken, returning the property afterwards or abandoning it does not remove the guilt of the thief,[102] though there are statutes in some states making the punishment less severe on reparation being voluntarily made.[103]

State, 31 Ohio St. 219, 27 Am. Rep. 506; Fort v. State, 82 Ala. 50, 2 South. 477.

[100] 3 Inst. 110; 1 Hale, P. C. 513; 2 East, P. C. 659; Palmer v. People, 10 Wend. (N. Y.) 166, 25 Am. Dec. 551; People v. Thompson, 34 Cal. 671; Com. v. Greene, 111 Mass. 392; People v. Wiley, 3 Hill (N. Y.) 194. Ante, p. 278.

[101] 2 Russ. Crimes, 158; Robinson v. State, 113 Ind. 510, 16 N. E. 184; Booth v. Com., 4 Grat. (Va.) 525; Black v. State, 83 Ala. 81, 3 South. 814, 3 Am. St. Rep. 691. Where conversion follows hard upon receipt, intent at the time of receipt may be inferred. Com. v. Rubin, 165 Mass. 453, 43 N. E. 200.

[102] 2 East, P. C. 557; State v. Scott, 64 N. C. 586; Georgia v. Kepford, 45 Iowa, 48; Eckels v. State, 20 Ohio St. 508; State v. Davis, 38 N. J. Law, 176, 20 Am. Dec. 367; Stepp v. State, 31 Tex. Cr. R. 349, 20 S. W. 753. See, also, ante, p. 296, notes 80–84. Of course, it is otherwise if the property is abandoned before there has been a sufficient asportation to constitute larceny. Edmonds v State, 70 Ala. 8, 45 Am. Rep. 67.

[103] Anderson v. State, 25 Tex. App. 593, 9 S. W. 43; Guest v. State, 24 Tex. App. 530, 7 S. W. 242; Boze v. State, 31 Tex. Cr. R. 347, 20 S. W. 752.

Same—Claim of Right.

Since the taking must be with felonious intent, or with intent to deprive the owner of his property in the thing taken, taking under a bona fide claim of right, however unfounded, is not larceny.[104] And, as we have seen,[105] although ignorance of the law is, as a rule, no excuse, it is an excuse if it negatives the existence of a specific intent. Therefore, even if the taker's claim of right is based upon ignorance or mistake of law, it is sufficient to negative a felonious intent.[106] A fortiori, a mistake of fact, if it is the basis of a bona fide claim of right, is sufficient. A mere custom to take goods without right, however, is not a sufficient basis for a claim of right.[107]

Same—Lucri Causa.

As to whether the taking must be lucri causa, that is, whether the thief must expect to reap some benefit, not necessarily pecuniary, to himself, the authorities are con-

[104] Hall v. State, 34 Ga. 208; State v. Holmes, 17 Mo. 379, 57 Am. Dec. 269; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; Severance v. Carr, 43 N. H. 65; People v. Carabin, 14 Cal. 438; State v. Fisher, 70 N. C. 78; Owens v. State, 21 Tex. App. 579, 2 S. W. 808; Causey v. State, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447; Buchanan v. State (Miss.) 5 South. 617; McGowan v. State, 27 Tex. App. 183, 11 S. W. 112; People v. Devine, 95 Cal. 378, 30 Pac. 378. Peaceably, and under advice of counsel, taking property from purchaser at execution sale. People v. Schultz, 71 Mich. 315, 38 N. W. 868. Cf. People v. Long, 50 Mich. 249, 15 N. W. 105. Creditor taking goods of debtor guilty of larceny. Gettinger v. State, 13 Neb. 308, 14 N. W. 308. Taking as agent on claim of ownership by principal. People v. Slayton, 123 Mich. 397, 82 N. W. 205, 81 Am. St. Rep. 211.

[105] Ante, p. 81.

[106] Rex v. Hall, 3 Car. & P. 409; Reg. v. Reed, Car. & M. 306; Com. v. Stebbins, 8 Gray (Mass.) 492. See, also, cases cited in note 7, supra. Ante, p. 82.

[107] Com. v. Doane, 1 Cush. (Mass.) 5 (custom to take fruit from

flicting. Mr. Wharton states that this element is essential, and argues the question at some length, citing a number of cases.[108] Mr. Bishop takes the contrary view.[109] On principle, "if," as Mr. Bishop says, "we may resort to it while dealing with a branch of the law so very technical," [110] the taking need not be for the advantage of the thief, and the motive is immaterial if the intent is to deprive the owner permanently of his property. This view appears to have prevailed in England.[111] The decisions in the different states are conflicting.[112] Those courts which hold a taking

vessel in transit); Hendry v. State, 39 Fla. 235, 22 South. 647. See Bolln v. State, 51 Neb. 581, 71 N. W. 444.

[108] 1 Whart. Cr. Law, § 895 et seq.

[109] 2 Bish. New Cr. Law, § 842 et seq.

[110] 2 Bish. New Cr. Law. § 842.

[111] Defendant was convicted of larceny of a horse, which he had taken from its stable and killed, in order to protect a man in custody for having previously stolen the horse. It was objected that the taking was not animo furandi et lucri causa. Six of the judges held it not essential that the taking be lucri causa, but that taking fraudulently with intent to deprive the owner wholly of the property was sufficient; but some of the six thought the object of protecting the man in custody might be deemed a benefit, or lucri causa. Five judges thought the conviction wrong. Rex v. Cabbage, Russ. & R. 292. Where it was the duty of a servant to split beans doled out to him, and feed them to his master's horses, and he took two bushels after receiving the daily allowance, intending to give them to the horses, eight out of eleven judges held it larceny, though some thought that the diminishing of the work in looking after the horses made the taking lucri causa. Rex v. Morfit, Russ. & R. 307. See, also, Reg. v. Privett, 1 Denison, Cr. Cas. 193.

[112] In the following cases a taking lucri causa was held essential: Respublica v. Teischer, 1 Dall. (Pa.) 335, 1 L. Ed. 163; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; State v. Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294 (repudiated in Williams v. State, 52 Ala. 413); State v. Brown, 3 Strob. (S. C.) 508; U. S. v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009; Pence v. State, 110 Ind. 95, 10 N.

lucri causa necessary regard a destruction of property merely for the purpose of destroying it to be malicious mischief only. By "lucri causa" is not meant pecuniary advantage.[113] Any benefit is sufficient. Thus, it has been held enough where a woman burned a letter to prevent harm to herself from the contents.[114]

Same—Coexistence of Act and Intent.

Not only must this felonious intent or animus furandi exist, but it must exist at the time the property is taken.[115] As before stated, to acquire possession of property lawfully, and afterwards form and carry out an intention to appropriate it, is not larceny; as, for instance, where possession of property is lawfully obtained by a bailee, and he subse-

E. 919. In the following cases it was held unnecessary: Hamilton v. State, 35 Miss. 214; Keely v. State, 14 Ind. 36; Williams v. State, 52 Ala. 411; State v. Davis, 38 N. J. Law, 176, 20 Am. Dec. 367; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; State v. Mills, 12 Nev. 403; State v. Slingerland, 19 Nev. 135, 7 Pac. 280; People v. Juarez, 28 Cal. 380; Delk v. State, 64 Miss. 77, 1 South. 9, 60 Am. Rep. 46; Warden v. State, 60 Miss. 640; State v. Caddle, 35 W. Va. 73, 12 S. E. 1098; State v. Wellman, 34 Minn. 221, 25 N. W. 395; Best v. State, 155 Ind. 46, 57 N. E. 534.

[113] Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670.

[114] Reg. v. Jones, 2 Car. & K. 236, 1 Denison, Cr. Cas. 188. See, also, Reg. v. Wynn, 3 Cox, Cr. Cas. 271.

[115] People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; Roberts v. State, 21 Tex. App. 460, 1 S. W. 452; State v. Shermer, 55 Mo. 83; People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; Morrison v. State, 17 Tex. App. 34, 50 Am. Rep. 120; State v. Hayes, 111 N. C. 727, 16 S. E. 410; Wilson v. People, 39 N. Y. 459; Guest v. State, 24 Tex. App. 235, 5 S. W. 840; Nichols v. State, 28 Tex. App. 105, 12 S. W. 500; People v. Morino, 85 Cal. 515, 24 Pac. 894; Hill v. State, 57 Wis. 377, 15 N. W. 445. Snatching money from another in fun with his knowledge; subsequent appropriation not larceny. Graves v. State, 25 Tex. App. 333, 8 S. W. 471.

quently determines to appropriate it.[116] Nor is it larceny to withhold and refuse to give up another's property if it was not taken with felonious intent.[117] We have already said something about excessive payments made by mistake,[118] and the finding of lost property,[119] but it will be well to consider the questions further in connection with the question of intent. It was stated that where more money than is due a man is paid him by mistake, and he appropriates it all to his own use, he is guilty of larceny if he knew of the mistake when he received it, but not if he was innocent then, and afterwards discovered the mistake, and fraudulently kept the excess. The weight of authority is in favor of this doctrine, on the ground that the fraudulent intent must exist at the time of the taking;[120] but there is at least one case which holds him guilty, whether he knew of the mistake when he received the money or not, on the ground that, to prevent the taking from being a trespass which, in connection with the subsequently formed and executed felonious intent, will make the taking larceny, the consent of the owner to part with his property must be as broad as the taking, and, as the owner did not consent to part with the excess, the taking, as to it, was a trespass.[121] As to the finding of lost property, it is universally held that

116 Ante, p. 287.

117 Reg. v. Gardner, 9 Cox, Cr. Cas. 253; Rex v. Banks, Russ. & R. 441.

118 Ante, p. 293.

119 Ante, p. 287.

120 People v. Miller, 4 Utah, 410, 11 Pac. 510; Reg. v. Middleton, 12 Cox, Cr. Cas. 260, 417; Reg. v. Flowers, Id. 33; Reg. v. Ashwell, 16 Cox, Cr. Cas. 1. Taking a coat containing, unknown to the taker, a watch, and afterwards appropriating the watch on discovering it, is a stealing of the watch also. Stevens v. State, 19 Neb. 647, 28 N. W. 304.

121 State v. Ducker, 8 Or. 394, 34 Am. Rep. 590.

if the finder does not know the owner at the time he finds it, and the circumstances are not such as to reasonably point out the owner, no subsequent fraudulent dealing with the property, even after he knows who the owner is, can make him guilty of larceny. If the original possession is innocent, a subsequent change of mind and fraudulent appropriation do not make him guilty.[122]

Same—Trespass in Original Taking.

There is an apparent exception to the rule that the intent to steal must exist at the time of taking, where the original taking, although not felonious, involves a trespass, even a mere civil trespass. In such case the trespass is deemed to continue, and a subsequent asportation is a renewal of the trespass, and, when accompanied with intent to steal, is larceny.[123] Thus, where the defendant, who had pastured his lambs with the prosecutor's, drove them off, and with them by mistake one of the latter's, and on perceiving the fact he appropriated the lamb, it was held larceny.[124] So, where the defendant obtained a horse by pretending he wanted to go to a certain place and for a certain time, and meant to go farther and longer, but not to steal the horse, and afterwards converted it, it was held that he was guilty of larceny, since he was a trespasser from the beginning, and the trespass was continuous, and, when to the tres-

[122] People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Reg. v. Preston, 5 Cox, Cr. Cas. 390; State v. Roper, 14 N. C. 473, 24 Am. Dec. 268; Ransom v. State, 22 Conn. 153; State v. Conway, 18 Mo. 321; Mayes v. State (Tenn. Sup.) 4 S. W. 659; Gregg v. State, 64 Ind. 223; Starck v. State, 63 Ind. 285, 30 Am. Rep. 214.

[123] Reg. v. Riley, 6 Cox, Cr. Cas. 88; Com. v. White, 11 Cush. (Mass.) 483; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610. See 2 Bish. New Cr. Law, § 829.

[124] Reg. v. Riley, supra.

pass was added a felonious intent, the larceny became complete from that moment.[125]

Simple and Compound Larceny.

At common law, compound larcenies are known by other names, and are treated as distinct crimes. Thus, to assault a person, and steal from his person, is a compound larceny, but it is known as robbery.[126] Statutes, however, both in England and in the United States, have created a number of compound larcenies, which are known and treated as such, and which are punished more severely than simple larceny. Thus, to steal from the person of another is a statutory compound larceny.[128] The original English statute defined it substantially as the felonious taking of any money, goods, or chattels from the person of another, "privily," without his knowledge.[129] The statutes in the different states vary somewhat, but they are all substantially based on this old

[125] State v. Coombs, supra. As to the continuing trespass, where goods stolen without are brought within the jurisdiction, post, p. 424; also, Reg. v. Wynn, 3 Cox, Cr. Cas. 271.

[126] Post, p. 323.

[128] Must be taken without owner's knowledge. Moye v. State, 65 Ga. 754. Contra, Com. v. Dimond, 3 Cush. (Mass.) 235. Suddenness of taking, and knowledge by owner, Green v. State, 28 Tex. App. 493, 13 S. W. 784; Brown v. State (Tex. Cr. App.) 22 S. W. 24. It is immaterial that person from whom the property was stolen was asleep. Hall v. People, 39 Mich. 717. Taking key from pocket of person asleep in bed, opening trunk, and taking property therefrom, is not a stealing from the person, but from the house, as the property is under the protection of the house, and not of the person. Com. v. Smith, 111 Mass. 429. Receiver of stolen goods not guilty of larceny from the person. People v. Sligh, 48 Mich. 54, 11 N. W. 782. The doctrine as to asportation is the same as in case of simple larceny. Dukes v. State, 22 Tex. App. 192, 2 S. W. 590. Drawing pocketbook partly from pocket held larceny from person. Flynn v. State, 42 Tex. 301.

[129] 8 Eliz. c. 4, § 2.

English statute. Other statutory compound larcenies are stealing from a dwelling house,[130] from a store or shop [131] or warehouse,[132] or any house or building,[133] and from a

[130] Underground cellar, not communicating with upper stories, and used for storage, not a "dwelling house." State v. Clark, 89 Mo. 423, 1 S. W. 332. Stealing watch hanging on post covered by roof of building is larceny from the building. Burge v. State, 62 Ga. 170. Furnished room in basement of office building, used as bedroom, is a "dwelling." People v. Horrigan, 68 Mich. 491, 36 N. W. 236. Theft from tent not a theft from dwelling house. Callahan v. State, 41 Tex. 43. Hotel kept by another than owner is dwelling house of keeper. State v. Leedy, 95 Mo. 76, 8 S. W. 245. Stealing property of A. from dwelling house of B. is a larceny from the dwelling house. Hill v. State, 41 Tex. 157. Taking key from pocket of person asleep in bed, and stealing from a trunk, is larceny from the dwelling house, and not from the person. Com. v. Smith, 111 Mass. 429; Rex v. Taylor, Russ. & R. 418. Larceny from dwelling house may be committed by invited guest, as the aggravation of the offense is the violation of the sanctity of the dwelling house. Point v. State, 37 Ala. 148. But it has been held that a servant, having the right of entry, cannot be guilty of stealing from master's dwelling house, but commits simple larceny only. Taylor v. State, 42 Tex. 388; Wakefield v. State, 41 Tex. 556. But see, contra, Wall v. State, 75 Ga. 474.

[131] Taking property from door of store, People v. Wilson, 55 Mich. 507, 21 N. W. 905.

[132] Trunk on covered platform of depot not in warehouse, Lynch v. State, 89 Ala. 18, 7 South. 829.

[133] Stealing from ginhouse outside the curtilage is stealing from house. It need not be a dwelling house. Stanley v. State, 58 Ga. 430. Servant stealing cotton from ginhouse is guilty of larceny from house. Wall v. State, 75 Ga. 474. Where a person went to a bank, laid his satchel on a shelf, and, while a confederate distracted his attention, the accused stole from the satchel, it was held a larceny from the house. Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885. Where a person in whose hands goods are placed in a store to examine, with a view to purchase them, runs off with them while the proprietor's back is turned, he does not steal from the building,

vessel. In some of the states larceny is divided into degrees, and by some it is made to include embezzlement, obtaining property by false pretenses, and almost all other frauds of like character.

EMBEZZLEMENT.

99. Embezzlement is not a crime at common law, but is made so by statute, to punish the fraudulent appropriation of property by one lawfully in possession before it has been in the possession of the owner, or by one who has lawfully obtained possession from the owner, and who in neither case is guilty of larceny, because there is no taking from the owner's possession by an act of trespass.

100. There are differences in the statutes of the various states, but the crime may be defined generally as the unlawful appropriation of property to his own use by a servant, clerk, trustee, public officer, or other person, to whom the possession has been intrusted by or for the owner.

In larceny, as has been seen, the property must be taken from the actual or constructive possession of the owner, and that crime cannot be committed by one who lawfully acquires possession of property for another in the course of business, and appropriates it before the latter comes into possession. Such is the case where money is paid by a third person to a clerk on his employer's account, and the clerk appropriates it before it has been put in the money drawer or otherwise come into his employer's possession. At common law, to constitute larceny, it is also necessary that the property be taken from the owner's possession by

but is guilty of simple larceny only; as, to constitute larceny from the building, the property must be under the protection of the building, and not under the eye of some one in the building. Com. v. Lester, 129 Mass. 101.

trespass, with intent to deprive him of his ownership; and therefore that crime is not committed by a bailee or other person who, after lawfully obtaining possession from the owner in good faith, appropriates it to his own use. It was to meet these cases that the embezzlement statutes were enacted. There is no such crime at common law.

The original English statute [1] was enacted in consequence of a decision that a banker's clerk who received money from a customer, and appropriated it to his own use, could not be convicted of larceny, on the ground that the money had never been in the employer's possession.[2] The English statutes and the statutes of the different states vary, and it is therefore impossible, in the limited space which the purpose of this book allows, to do more than give this general explanation of the crime. The statutes must be consulted. Mr. Wharton states that these statutes were not intended to overlap the common law, but to provide for those cases which it could not reach, and that larceny at common law cannot be embezzlement under the statute, and there are many cases to the same effect.[3] Mr. Bishop and other courts take the contrary view.[4]

§§ 99–100. [1] 39 Geo. III, c. 85.

[2] Rex v. Bazeley, 2 East, P. C. 571.

[3] 1 Whart. Cr. Law, §§ 1009, 1027–1029, 1050; Rex v. Headge, Russ. & R. 160; Rex v. Sullens, 1 Moody, Cr. Cas. 129; Quinn v. People, 123 Ill. 337, 15 N. E. 46; Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767; Com. v. O'Malley, 97 Mass. 584; Com. v. Davis, 104 Mass. 548; State v. Sias, 17 N. H. 558; Lowenthal v. State, 32 Ala. 589; People v. Perini, 94 Cal. 573, 29 Pac. 1027; People v. Johnson, 91 Cal. 265, 27 Pac. 663; Cody v. State, 31 Tex. Cr. R. 183, 20 S. W. 398. Extracting from cash register money not yet registered by clerk is embezzlement. Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. Rep. 560.

[4] 2 Bish. New Cr. Law, §§ 328, 329. And see People v. Dalton, 15 Wend. (N. Y.) 581.

The statutes generally are directed at servants, clerks, and agents who appropriate to their own use property which they have received for their master or principal, or at bailees or other trustees who appropriate the property which they have bona fide received.[5] Some, if not most, of the stat-

[5] Johnson v. Com., 5 Bush (Ky.) 430. Who is a "clerk" or "servant." Employment need not be permanent, Reg. v. Negus, L. R. 2 Cr. Cas. 35; Com. v. Foster, 107 Mass. 221. Commercial traveler paid by commission, Reg. v. Bowers, L. R. 1 Cr. Cas. 41. Being under master's control the test. Gravatt v. State, 25 Ohio St. 162. Express contract and salary not necessary, but one may act gratuitously. Reg. v. Foulkes, L. R. 2 Cr. Cas. 150; State v. Brooks, 85 Iowa, 366, 52 N. W. 240. Person receiving material from another to work up in his own shop, Com. v. Young, 9 Gray (Mass.) 5. Same person acting as servant of different persons, Rex v. Carr, Russ. & R. 198; Reg. v. Bayley, 26 Law J. M. Cas. 4; Reg. v. Tite, 30 Law J. M. Cas. 142. Person on salary may be agent, and not servant. Reg. v. Walker, Dears. & B. Cr. Cas. 606. Stagedriver, People v. Sherman, 10 Wend. (N. Y.) 298, 25 Am. Dec. 563. Treasurers, Com. v. Tuckerman, 10 Gray (Mass.) 173. Constable employed to collect money with discretionary power, People v. Allen, 5 Denio (N. Y.) 76. Who are "agents," Com. v. Young, 9 Gray (Mass.) 5; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185. Attorney collecting money for client acts as "agent." People v. Converse, 74 Mich. 478, 42 N. W. 70, 16 Am. St. Rep. 648. Post-office department employé not agent of person sending letter. Brewer v. State, 83 Ala. 113, 3 South. 816, 3 Am. St. Rep. 693. Consignee of merchandise for sale, Com. v. Keller, 9 Pa. Co. Ct. R. 253. Who are "officers." President and directors of bank, Com. v. Wyman, 8 Metc. (Mass.) 247; Reeves v. State, 95 Ala. 31, 11 South. 158; unincorporated association, Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166. "Officer, agent, etc., of any corporation," does not include public officers, like clerk of court, State v. Connelly, 104 N. C. 794, 10 S. E. 469; nor does statute against embezzlement by clerk or certain other officers, Id. Who are "trustees." Savings bank officer, Reg. v. Fletcher, 9 Cox, Cr. Cas. 189. Broker, Com. v. Foster, 107 Mass. 221; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185; Morehouse v. State, 35 Neb. 643, 53 N. W. 571. "Bailee" or debtor, Wallis v. State, 54 Ark. 611,

utes, declare that such appropriation shall be deemed larceny; but the crime is nevertheless generally known as embezzlement, and is entirely distinct from larceny at common law. Even where a statute has enacted that a person who commits any of various enumerated acts which formerly constituted embezzlement or false pretenses is guilty of larceny, there being several distinct ways in which "larceny" may be committed, the indictment must charge the act so as to inform the accused in which way he is charged; and an indictment charging larceny in the common form would not be sustained by proof of appropriation by the accused having possession as bailee or by proof of obtaining property by false pretense.[6] There are also statutes in most of the states punishing embezzlement by public officers,[7] and acts

16 S. W. 821. "Trustee" or debtor, Mulford v. People, 139 Ill. 586, 28 N. E. 1096. Pledgee, Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65. Any carrier or "other bailee," State v. Grisham, 90 Mo. 163, 2 S. W. 223. Person "intrusted with money to be delivered to another," Shelburn v. Com., 85 Ky. 173, 3 S. W. 7.

[6] State v. Farrington, 59 Minn. 147, 60 N. W. 1088, 28 L. R. A. 395; State v. Friend, 47 Minn. 449, 50 N. W. 692.

[7] Justice of the peace a "county officer." Crump v. State, 23 Tex. App. 615, 5 S. W. 182. Deputy sheriff a public officer. State v. Brooks, 42 Tex. 62. Drainage commissioner a county officer. State v. Wells, 112 Ind. 237, 13 N. E. 722. State treasurer, State v. Archer, 73 Md. 44, 20 Atl. 172; People v. McKinney, 10 Mich. 54; Hemingway v. State, 68 Miss. 371, 8 South. 317; State v. Noland, 111 Mo. 473, 19 S. W. 715. Clerk in collector of customs office not a public officer charged with safe-keeping of public money. U. S. v. Smith, 124 U. S. 525, 8 Sup. Ct. 595, 31 L. Ed. 534. By county treasurer, State v. Mims, 26 Minn. 183, 2 N. W. 494; State v. Baumhager, 28 Minn. 226, 9 N. W. 704; State v. Ring, 29 Minn. 78, 11 N. W. 233; State v. Czizek, 38 Minn. 192, 36 N. W. 457; State v. King, 81 Iowa, 587, 47 N. W. 775. By city comptroller of negotiable city bonds, State v. White, 66 Wis. 343, 28 N. W. 202. No demand by successor in office is necessary. Hollingsworth v. State, 111 Ind. 289, 12 N. E.

of congress punishing embezzlement by public officers charged with the safe-keeping of public moneys, by national bank officers, and embezzlement from the mails.

As in case of larceny, a special owner, such as a bailee, is doubtless regarded as owner, so that ownership may be laid in him in the indictment.[8] The property must not have belonged to the accused, and there are cases which hold that one cannot embezzle property which he owns jointly with another.[9]

The gist of the offense is breach of trust. The statutes in general do not apply to appropriation of property by any person unless he held a relation of confidence or trust towards the owner, and had possession of the property by virtue of such relation, and converted it in violation of the trust reposed in him. It has therefore been held that where a person drawing his deposit from a bank is by mistake paid more than is due him, and he fraudulently appropriates it, he is not guilty, under a statute punishing "any per-

490. Clerk of board of county commissioners not a public officer. State v. Denton, 74 Md. 517, 22 Atl. 305. Need only be a de facto officer. State v. Findley, 101 Mo. 217, 14 S. W. 185.

[8] Consignee has sufficient ownership. Waterman v. State, 116 Ind. 51, 18 N. E. 63. Embezzlement from thief. State v. Littschke, 27 Or. 189, 40 Pac. 167.

[9] Property belonging partly to the accused, State v. Kusnick, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. Rep. 564; State v. Kent, 22 Minn. 41, 21 Am. Rep. 764. Partner cannot embezzle general partnership funds. State v. Reddick, 2 S. D. 124, 48 N. W. 846; State v. Butman, 61 N. H. 511, 60 Am. Rep. 332; Gary v. Association, 87 Iowa, 25, 53 N. W. 1086. Contra as to surviving partners, under statute making their duties and liabilities similar to those of executors and administrators. State v. Matthews, 129 Ind. 281, 28 N. E. 703. As an assignment of his unearned salary by a government employé is void as against public policy, he does not embezzle by converting it to his own use when collected. State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358.

son to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered," if he "shall embezzle or fraudulently convert" the same to his own use;[10] and no doubt this statute is as broad in its language as any. Ordinarily, if the relation between the parties is such that the relation of debtor and creditor is created by the transaction,—as where an agent has authority, derived from the nature of the business or otherwise, to mix the proceeds of a sale with his own funds,—appropriation of the property coming into possession of the accused is not embezzlement.[11] Not only must there be a relation

[10] Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662; People v. Gallagher (Cal.) 33 Pac. 890. Person converting money delivered to him for safe-keeping not guilty. Com. v. Williams, 3 Gray (Mass.) 461. Funds of corporation spent by treasurer of corporation before his election not embezzlement. Lee v. Com. (Ky.) 1 S. W. 4. To constitute embezzlement by agent, the property must have come into his possession in the course of, or by virtue of, his employment. Rex v. Snowley, 4 Car. & P. 390; Rex v. Thorley, 1 Moody, Cr. Cas. 343; Rex v. Hantin, 7 Car. & P. 281; Ex parte Hedley, 31 Cal. 108; State v. Goode, 68 Iowa, 593, 27 N. W. 772. Authority in servant to receive money necessary in Iowa. State v. Ridley, 48 Iowa, 370. Where clerk collects bill due his employer without authority he cannot embezzle the money. Brady v. State, 21 Tex. App. 659, 1 S. W. 462. Servant, to be guilty, must have received property for, or in the name of, or on account of, his master. Reg. v. Cullum, L. R. 2 Cr. Cas. 28; Reg. v. Read, 3 Q. B. Div. 131. Agent receiving employer's money after expiration of employment may be convicted under statute punishing embezzlement by agent of money which has come into his possession "by virtue of his employment." State v. Jennings, 98 Mo. 493, 11 S. W. 980. Person not a public officer, but receiving public money by representing that he is entitled to receive it, not guilty. State v. Bolin, 110 Mo. 209, 19 S. W. 650.

[11] Com. v. Stearns, 2 Metc. (Mass.) 343; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185; Com. v. Foster, 107 Mass. 221; Mulford v. People, 139 Ill. 586, 28 N. E. 1096; People v. Wadsworth, 63

of confidence and trust between the person appropriating property and the owner to constitute embezzlement, but the appropriation must be with a fraudulent intent; mere breach of contract, as, for instance, a failure to pay back borrowed money, or a mere neglect to pay over funds, is not sufficient.[12] We have seen that to take property from another's possession under a bona fide claim of right is not larceny. So, also, where a person retains money which he has received under a bona fide claim of right, without secrecy or concealment, no matter how untenable or even frivolous the claim may be, he is not guilty of embezzlement.[13] After an embezzlement, an offer or intent to restore the money, or even a settlement with the owner by defendant's bondsmen, does not purge him of his guilt, or prevent his punishment.[14]

Mich. 500, 30 N. W. 99; State v. Covert, 14 Wash. 652, 45 Pac. 304. And see cases cited in note 12, infra.

[12] Kribs v. People, 82 Ill. 425; People v. Galland, 55 Mich. 628, 22 N. W. 81; Fitzgerald v. State, 50 N. J. Law, 475, 14 Atl. 746; People v. Hurst, 62 Mich. 276, 28 N. W. 838; Penny v. State, 88 Ala. 105, 7 South. 50; Etheridge v. State, 78 Ga. 340; Stallings v. State, 29 Tex. App. 220, 15 S. W. 716; Home Lumber Co. v. Hartman, 45 Mo. App. 647. Even where statute is silent as to intent. State v. Meyer, 23 Wkly. Law Bul. (Ohio) 251. Use of money by guardian, Myers v. State, 4 Ohio Cir. Ct. R. 570. Intent to replace money no defense. State v. Trolson, 21 Nev. 419, 32 Pac. 930. Demand not necessary, State v. New, 22 Minn. 76; Wallis v. State, 54 Ark. 611, 16 S. W. 821; Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; State v. Comings, 54 Minn. 359, 56 N. W. 50. For a discussion of the question of intent, see State v. Trolson, 21 Nev. 419, 32 Pac. 930. See, also, State v. Kortgaard, 62 Minn. 7, 64 N. W. 51.

[13] Reg. v. Norman, Car. & M. 501. And see cases in preceding note.

[14] Robson v. State, 83 Ga. 166, 9 S. E. 610; Fleener v. State, 58 Ark. 98, 23 S. W. 1; State v. Pratt, 98 Mo. 482, 11 S. W. 977; People v. De Lay, 80 Cal. 52, 22 Pac. 90.

CHEATING AT COMMON LAW.

101. A cheat at common law is the fraudulent obtaining of another's property by means of some false symbol or token, and possibly by illegal practices, which affect or may affect the public, and against which common prudence cannot guard; provided, however, that the act does not amount to some felony.[1]

102. The crime is a misdemeanor.

The books differ in their definitions of this crime. Some of them assert that it is essential that the cheat shall be effected by means of a false symbol or token;[2] others, that it may be effected by means of deceitful and illegal practices and devices.[3] The latter term might include other means than symbols and tokens. In any case, the symbol, token, device, or practice must be such that common prudence cannot guard against it. Mere lies and false representations are not sufficient.[4] Thus, if a merchant gives a customer less than the full measure, telling him that it is a full measure, but not weighing it out to him, this is not a cheat, but a mere lie. If, on the other hand, by using a false measure, he gives him less than the full measure, it is a cheat, the false measure being a token. On the prosecution of a brewer for delivering a less quantity of beer than he had contracted to deliver, but without the use of any false measure, the offense was held not to be an indictable cheat. Lord Mansfield said: "That the offense here charged should not be considered as an indictable offense,

§§ 101–102. [1] 2 East, P. C. 817; see People v. Garnett, 35 Cal. 470, 95 Am. Dec. 125.

[2] 2 Bish. New Cr. Law, § 143.

[3] 2 Whart. Cr. Law, 116; Steph. Dig. Cr. Law, art. 338.

[4] Com. v. Warren, 6 Mass. 72; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256.

but left to a civil remedy, by an action, is reasonable and right in the nature of the thing, because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor upon receiving it, to see whether it held out the just measure or not. The offense that is indictable must be such a one as affects the public, as if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing; so if a man defrauds another under false tokens, for these are deceptions that common care and prudence are not sufficient to guard against. Those cases are much more than mere private injuries; they are public offenses. But here it is a mere private imposition or deception." [5] Among the various false symbols and tokens are false measures, false weights, false marks of weight, false stamps, counterfeit orders, etc.[6] It is stated by some authorities that the cheat must be such as may deceive the public generally,[7] while others take the contrary ground.[8] The token itself need not be public, as an old English statute, which is part of our common law, makes it a cheat to defraud by means of a privy token.[9]

[5] Rex v. Wheatley, 2 Burrows, 1125.

[6] See State v. Jones, 70 N. C. 75; Com. v. Speer, 2 Va. Cas. 65; Jones v. State, 50 Ind. 473. False bank bill or note, Com. v. Boynton, 2 Mass. 77; Lewis v. Com., 2 Serg. & R. (Pa.) 551; State v. Stroll, 1 Rich. Law (S. C.) 244. Bread under weight, Respublica v. Powell, 1 Dall. (Pa.) 47, 1 L. Ed. 31.

[7] 2 Whart. Cr. Law, § 1126.

[8] 2 Bish. New Cr. Law, 157.

[9] 33 Hen. VIII. c. 1, § 2; 2 Bish. New Cr. Law, § 157.

CHEATING BY FALSE PRETENSES.

103. Obtaining property by false pretenses, not amounting to a common-law cheat, is not a crime at common law, but is very generally made so by statute.

104. The statutes generally define the crime substantially as the knowingly and designedly obtaining of the property of another by false pretenses, with intent to defraud.

(a) The pretense must be a false representation as to some past or existing fact or circumstance, and not a mere expression of opinion or a promise.

(b) It must be knowingly false.

(c) It must be made with intent to defraud.

(d) It must be calculated to defraud.

(e) It must deceive and defraud; that is,

(1) It must be believed, and

(2) The property must be parted with,

(3) Because of the representation.

As has already been shown, one who obtains property from another by false and fraudulent representations does not commit larceny where the owner intends to part with his ownership, nor is he guilty of the common-law crime of cheating, as the cheat is only a private fraud. At common law, therefore, he went unpunished. These statutes against false pretenses were intended to fill this gap in the common law. The term "false pretenses" is not intended to cover cases of cheating where false symbols or tokens are used, but means false representations as to facts.

The representation need not be by word of mouth, but may be by writing, as where a check on a bank in which the drawer has no funds is used to obtain money or goods.[1]

§§ 103–104. [1] Rex v. Jackson, 3 Camp. 370; Rex v. Parker, 7 Car. & P. 825; Barton v. People, 35 Ill. App. 573, affirmed in 135 Ill. 405, 25 N. E. 776, 10 L. R. A. 302, 25 Am. St. Rep. 375. Otherwise if one obtains money at a bank where one has an account, by presenting

The representation must be as to a past or existing fact or circumstance, and not a mere promise to do something in the future.[2] But if there is a false representation, except for which the property would not have been obtained, it is

a check on the bank, though with knowledge that the account is overdrawn. Com. v. Drew, 19 Pick. (Mass.) 179. Falsely personating officer to extort money, Perkins v. State, 67 Ind. 270, 33 Am. Rep. 89; People v. Stetson, 4 Barb. (N. Y.) 151; McCord v. People, 46 N. Y. 470; Com. v. Henry, 22 Pa. 253. False pretenses by pretending physician, Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71. Personating collector, Hall v. Com. (Ky.) 9 S. W. 409.

[2] Com. v. Moore, 89 Ky. 542, 12 S. W. 1066; Scarlett v. State, 25 Fla. 717, 6 South. 767; Thomas v. State, 90 Ga. 437, 16 S. E. 94; Com. v. Warren, 94 Ky. 615, 23 S. W. 193. False representation by banker or officer of bank, that bank is solvent, Com. v. Wallace, 114 Pa. 405, 6 Atl. 685, 60 Am. Rep. 353; Com. v. Schwartz, 92 Ky. 510, 18 S. W. 775, 36 Am. St. Rep. 609. Representation that one has a certain sum of money, partly paid and partly to be received, in right of his wife, Com. v. Burdick, 2 Pa. 163, 44 Am. Dec. 186. And see Reg. v. Henderson, 1 Car. & M. 328. That one has just purchased farm, State v. Fooks, 65 Iowa, 452, 21 N. W. 773. That brother is to arrive with money, and a promise to pay it, State v. Fooks, 65 Iowa, 196, 21 N. W. 561. False pretense that package is intended for person, State v. Kube, 20 Wis. 217, 91 Am. Dec. 390. That one has credit with drawee of draft, and that it will be paid, People v. Wasservogle, 77 Cal. 113, 19 Pac. 270. Obtaining receipt by falsely pretending that one intends to pay debt, State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271. Statement that plated spoons were equal to "Elkinton's A," and had as much silver in them, held mere puffing. Reg. v. Bryan, 7 Cox, Cr. Cas. 312. On the other hand, a false statement that a chain was "15-carat gold, and you will see it stamped on every link," was held within the statute. Reg. v. Ardley, 12 Cox, Cr. Cas. 23. Obtaining satisfaction of debt, no money being paid, Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103. By hotel keeper to procure boarder, Morgan v. State, 42 Ark. 131, 48 Am. Rep. 55. Obtaining board, State v. Black, 75 Wis. 490, 44 N. W. 635; State v. Tull, 42 Mo. App. 324; State v. Kingsley, 108 Mo. 135, 18 S. W. 994.

immaterial that it is united with a promise.[3] An example of the crime is where one obtains goods on credit by falsely representing that he is in business, or is solvent.[4] This is a representation as to an existing fact. One, however, who obtains goods on credit, on the representation that he will pay for them, is not guilty, as this is a mere promise.[5] So, also, for a person to obtain property from another by means of a false representation that he will get a position for him is not obtaining property by false pretenses, within the meaning of the statute;[6] but it is otherwise if the representation is that he has got him a position.[7] To obtain property from a merchant by falsely representing that another has authorized the purchase on his credit is within the statute.[8] Mere expressions of opinion are not false pretenses, nor are mere exaggerated statements; as, for instance, exaggerated praise of an article for the purpose of selling it, or expressions of opinion as to value, quality, and the like,[9] though it is otherwise as to quantity or weight.[10]

[3] Obtaining money on false statement that accused was unmarried, would marry giver, and lay out money on a house. Reg. v. Jennison, 9 Cox, Cr. Cas. 158; State v. Thaden, 43 Minn. 325, 45 N. W. 614.

[4] Higler v. People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267; State v. Sumner, 10 Vt. 587, 33 Am. Dec. 219; Taylor v. Com., 94 Ky. 281, 22 S. W. 217.

[5] Rex v. Goodhall, Russ. & R. 461; Reg. v. Walne, 11 Cox, Cr. Cas. 647; Glacken v. Com., 3 Metc. (Ky.) 233; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271.

[6] Ranney v. People, 22 N. Y. 413. But see People v. Winslow, 39 Mich. 505.

[7] Com. v. Parker, Thatcher, Cr. Cas. 24.

[8] People v. Johnson, 12 Johns. (N. Y.) 292. Pretending to be sent by another for money, State v. Dixon, 101 N. C. 741, 7 S. E. 870.

[9] People v. Jacobs, 35 Mich. 36; Reg. v. Williamson, 1 Cox, Cr.

[10] Reg. v. Ridgway, 3 Fost. & F. 838; Reg. v. Ragg, 8 Cox, Cr. Cas. 262.

It is not necessary that anything shall be said or written, for a pretense may be made by acts as well as words.[11] Thus, a person who fraudulently wore a cap and gown to lead tradesmen to believe he was a student at the University of Oxford, and thereby procured goods from them, was held guilty;[12] and where a person who had been placed on the list of county paupers afterwards removed from the county, and ceased to be entitled to relief, one who continued to apply for and draw her monthly stipend was held guilty, on the ground that every fresh application was a reaffirmance of the alleged pauper's continuing rights as such.[13]

Intent to defraud by the representation is an essential element of the crime. The making of a false representation is not of itself criminal; it becomes so only when knowingly made, and, further than that, when made with an intention of defrauding thereby. In the absence of such an intent, the crime cannot be committed.[14] The pretense must

Cas. 328; Reg. v. Bryan, 26 Law J. M. Cas. 84; People v. Morphy, 100 Cal. 84, 34 Pac. 623. Representation that mortgage is sufficient security, People v. Gibbs, 98 Cal. 661, 33 Pac. 630. Otherwise as to representations as to value of railroad bonds, People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73, and as to bill of broken bank, Com. v. Stone, 4 Metc. (Mass.) 43. Otherwise, also, in case of false representation by seller of horse that it is sound and kind, State v. Wilkerson, 103 N. C. 337, 9 S. E. 415; State v. Burke, 108 N. C. 750, 12 S. E. 1000; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; State v. Stanley, 64 Me. 157; Jackson v. People, 126 Ill. 139, 18 N. E. 286; and by seller of sheep that they are sound, People v. Crissie, 4 Denio (N. Y.) 525.

[11] Reg. v. Goss, 8 Cox, Cr. Cas. 262 (showing false sample).

[12] Rex v. Barnard, 7 Car. & P. 784.

[13] State v. Wilkerson, 98 N. C. 696, 3 S. E. 683.

[14] Rex v. Wakeling, Russ. & R. 504 (stating to parish officer that accused had no clothes, when a mere excuse for not working, and not a false pretense to obtain clothes); Reg. v. Stone, 1 Fost. & F.

deceive [15] and defraud. It must therefore be relied on, and must be the cause of the transfer of the property obtained, but it need not be the sole cause; [16] and it must defraud.[17] If the pretense defrauds, it is immaterial that the person defrauded parts with his property from motives of charity, and not of self-interest.[18] A man is not defrauded who by

311; People v. Getchell, 6 Mich. 496; Com. v. Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Blum v. State, 20 Tex. App. 578, 54 Am. Rep. 530; People v. McAllister, 49 Mich. 12, 12 N. W. 891; People v. Wakely, 62 Mich. 297, 28 N. W. 871. In re Cameron, 44 Kan. 64, 24 Pac. 90, 21 Am. St. Rep. 262. Procuring indorsement of draft, believing it will be honored, Ketchell v. State, 36 Neb. 324, 54 N. W. 564.

[15] Reg. v. Mills, 7 Cox, Cr. Cas. 263; Com. v. Drew, 19 Pick. (Mass.) 179.

[16] Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; People v. Haynes, 11 Wend. (N. Y.) 557; State v. Thatcher, 35 N. J. Law, 445; People v. McAllister, 49 Mich. 12, 12 N. W. 891; State v. Fooks, 65 Iowa, 196, 21 N. W. 561; State v. Metsch, 37 Kan. 222, 15 Pac. 251; State v. Stone, 75 Iowa, 215, 39 N. W. 275. False pretense after goods have been obtained not within the statute. People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530. And see State v. Willard, 109 Mo. 242, 19 S. W. 189. Property must be obtained. Ex parte Parker, 11 Neb. 309, 9 N. W. 33. Obtaining deed in exchange; effect of covenants in deed given. State v. Butler, 47 Minn. 483, 50 N. W. 532. See, also, Com. v. Lee, 149 Mass. 179, 21 N. E. 299. Representations as to title of land are not indictable where the person to whom they were made did not rely on them, but had his attorney examine the title. People v. Gibbs, 98 Cal. 661, 33 Pac. 630. False pretense of supernatural power to cure is not impaired by promise to exercise it. Jules v. State, 85 Md. 305, 36 Atl. 1027.

[17] Misrepresenting value of note given as security not indictable where other notes given at the time are a sufficient protection. State v. Palmer, 50 Kan. 318, 32 Pac. 29.

[18] Com. v. Whitcomb, 107 Mass. 486; Reg. v. Jones, 1 Denison, Cr. Cas. 551; State v. Carter, 112 Iowa, 15, 83 N. W. 715. Contra, People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

false pretenses is induced to pay what is due.[19] It must also be to some extent calculated to deceive; that is, it must not be plainly absurd or irrational, and the person defrauded must not be guilty of gross carelessness.[20] It is not necessary, however, that any false token shall be used, or that the pretense shall be such that ordinary care and common prudence could not guard against it, as in the case of cheating at common law.[21] In determining whether it was calculated to deceive, it must be considered with reference to all the circumstances, and the intelligence of the person defrauded.[22] Gross carelessness on his part is a defense, but mere credulity is not.[23] The pretense must

[19] Com. v. McDuffy, 126 Mass. 467; People v. Thomas, 3 Hill (N. Y.) 169 (inducing payment of note by pretending it is lost).

[20] People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530; Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; Com. v. Drew, 19 Pick. (Mass.) 179; People v. McAllister, 49 Mich. 12, 12 N. W. 891; State v. Estes, 46 Me. 150; State v. De Hart, 6 Baxt. (Tenn.) 222; Burrow v. State, 12 Ark. 65; State v. Young, 76 N. C. 258; People v. Williams, 4 Hill (N. Y.) 9, 40 Am. Dec. 258. Pretending to be witch doctor, State v. Burnett, 119 Ind. 392, 21 N. E. 972.

[21] People v. Haynes, 14 Wend. (N. Y.) 546, 28 Am. Dec. 530; People v. Rice, 59 Hun, 616, 13 N. Y. Supp. 161; Id., 128 N. Y. 649, 29 N. E. 146; Lefler v. State, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St. Rep. 300; State v. Southall, 77 Minn. 296, 79 N. W. 1007.

[22] Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71; Cowen v. People, 14 Ill. 348; State v. Mills, 17 Me. 211; Smith v. State, 55 Miss. 513; Johnson v. State, 36 Ark. 242; State v. McConkey, 49 Iowa, 499; State v. Montgomery, 56 Iowa, 195, 9 N. W. 120; State v. Davis, 56 Iowa, 202, 9 N. W. 123; People v. Summers, 115 Mich. 537, 73 N. W. 818. Whether the pretense was relied on, and the other was defrauded thereby, is for the jury, though it appears that, if he had used ordinary prudence, he would not have been misled. State v. Knowlton, 11 Wash. 512, 39 Pac. 966.

[23] State v. Fooks, 65 Iowa, 196, 21 N. W. 561; People v. Cole, 65 Hun, 624, 20 N. Y. Supp. 505; Id., 137 N. Y. 530, 33 N. E. 336; Oxx

be false in fact. If it turns out to be true, the crime is not committed, though the accused really believed it to be false, and intended to defraud.[24] The fact that the person defrauded also made false representations, with intent to defraud, is no defense.[25]

What property may be the subject of false pretenses must, of course, be determined by the statute. As a rule, however, it must be such as may be the subject of larceny. It has been held that the statute did not apply to a dog,[26] or to a conveyance of land,[27] or to a case where the accused obtained board and lodging by false pretenses.[28]

To constitute the crime of false pretenses it is essential

v. State, 59 N. J. Law, 99, 35 Atl. 646. And see cases cited in preceding note.

[24] Thus, it was held that a representation by a second mortgagee, with a fraudulent intent, that his mortgage was a first mortgage, was not within the statute, where the first mortgagee had induced him to make the representation, for the reason that the first mortgagee thereby became estopped, and in effect made the second mortgage a prior lien. State v. Asher, 50 Ark. 427, 8 S. W. 177. So, also, where a person fraudulently represented that a certain crop was not covered by a mortgage, and it turned out that, because of a defect in the description in the mortgage, it was not in fact covered. State v. Garris, 98 N. C. 733, 4 S. E. 633.

[25] Com. v. Morrill, 8 Cush. (Mass.) 571; People v. Watson, 75 Mich. 582, 42 N. W. 1005; Reg. v. Hudson, 8 Cox, Cr. Cas. 305; In re Cummins, 16 Colo. 451, 27 Pac. 887, 13 L. R. A. 752, 25 Am. St. Rep. 291. And see People v. Henssler, 48 Mich. 50, 11 N. W. 804, where it was held that the fact that one whose indorsement on a note was procured by false pretenses knew that his indorsement was to be used dishonestly was no defense. See, also, Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77. But see McCord v. People, 46 N. Y. 470.

[26] Reg. v. Robinson, Bell, Cr. Cas. 34.

[27] State v. Burrows, 33 N. C. 477; People v. Cummings, 114 Cal. 437, 46 Pac. 284.

[28] State v. Black, 75 Wis. 490, 44 N. W. 635. See, also, Reg. v. Gardner, 7 Cox, Cr. Cas. 136.

that there should be an intention on the part of the accused to deprive the owner wholly of his property, and an intention on the part of the owner to transfer the property. Obtaining the temporary use of an article by false pretenses is not within the statute.[29] It seem, however, that it is not essential that the property actually pass, provided the owner has the intention to transfer the property. It has been so held where goods are obtained from a tradesman by the accused under the false pretense that he comes from a customer for whom the goods are intended, although in such case no property passes.[30]

ROBBERY.

105. Robbery is an aggravated form of larceny, but is treated as a distinctive crime. It is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation.[1]

106. To constitute the crime

(a) The property must be such as may be the subject of larceny.

(b) It must be taken and carried away, as in case of larceny.

(c) It must be taken from another's person, or in his actual presence.

(d) It must be so taken by violence or by putting in fear.

(e) It must be taken with intent to steal.

107. Robbery is a felony at common law.[2]

Robbery is at once a crime against the person and a crime against property. The elements necessary to con-

[29] Reg. v. Kilham, L. R. 1 Cr. Cas. 261; Cline v. State, 43 Tex. 494; 2 Bish. Cr. Law, § 477.

[30] Rex v. Adams, Russ. & R. 225; People v. Johnson, 12 Johns. 292; Whart. Cr. Law, § 1142. The title to the property need not pass to the accused. Com. v. Langley, 169 Mass. 89, 47 N. E. 511.

§§ 105–107. [1] 1 Whart. Cr. Law, § 846.

[2] 3 Inst. 68.

stitute the crime of larceny are also essential to constitute robbery, and it is not necessary to go over these again. There are, however, these further essentials: The taking must be either from the owner's person, as where money is forcibly taken from his pocket; or in his actual presence, so that the thing taken is virtually under the protection of his person, as where he is by intimidation compelled to open his desk or safe, or where he is compelled to stand still while his cattle are driven off or other property taken.[3] Furthermore, some violence or intimidation must be used in the taking, or it is merely larceny.[4] Pocket picking by stealth merely is not robbery; nor is it robbery to snatch a thing from the person;[5] but it is otherwise if there is a struggle by the owner to keep the property, or if it is detached by force, as, for instance, where a

[3] Rex v. Francis, 2 Strange, 1015; Reg. v. Selwag, 8 Cox, Cr. Cas. 235; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460; Bussey v. State, 71 Ga. 100, 51 Am. Rep. 256; U. S. v. Jones, 3 Wash. C. C. 209, 216, Fed. Cas. No. 15,494; Clements v. State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385; Williams v. State, 12 Tex. App. 240; State v. Calhoun, 72 Iowa, 432, 34 N. W. 194, 2 Am. St. Rep. 252; Hill v. State, 42 Neb. 503, 60 N. W. 916. Where robbers forcibly entered an express car, ejected the agent by violence, cut the train in two, and moved the forward portion a quarter of a mile, and then blew open the safe, there was a taking by force and violence within presence of the agent, though he was not actually present when the safe was opened. State v. Kennedy, 154 Mo. 268, 55 S. W. 293.

[4] State v. John, 50 N. C. 163, 69 Am. Dec. 777. One who takes money from the pocket of a person forcibly held by a confederate commits robbery. Wheeler v. Com., 86 Va. 658, 10 S. E. 924. The violence need not intimidate. People v. Glynn, 54 Hun, 332, 7 N. Y. Supp. 555. See, also, note 6.

[5] Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; State v. Miller, 83 Iowa, 291, 49 N. W. 90; Doyle v. State, 77 Ga. 513; Territory v. McKern, 2 Idaho, 759, 26 Pac. 123; Fanning v. State, 66 Ga. 167; Spencer v. State, 106 Ga. 692, 32 S. E. 849. Ante, p. 279, note 36.

watch chain is broken in snatching a watch.[6] The force, or intimidation supplying force, must be in the taking, and therefore to take money from another without force, and afterwards resist when the owner seeks to retake it, is not robbery; nor would a struggle to get away after the taking supply force in the taking.[7] To take one's own property by force is not robbery, for, as in larceny, the property must be another's;[8] and for a person to take property by force under a bona fide belief that it belongs to him is not robbery, for there must be the same felonious intent as in case of larceny.[9] Felonious intent is always essential, and an instruction ignoring that element is ground for reversing a conviction.[10] It has been held not to be robbery to ex-

[6] 2 Russ. Crimes, 419; Rex v. Lapier, 2 East, P. C. 557; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; State v. Trexler, 4 N. C. 188, 6 Am. Dec. 558.

[7] 2 East, P. C. 707; Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; Fanning v. State, 66 Ga. 167; Thomas v. State, 91 Ala. 34, 9 South. 81. But see Sherman v. State, 4 Ohio Cir. Ct. R. 531, holding that it is robbery to snatch property without using force or intimidation, and, immediately after seizing it, to strike the owner, and run. The ground of the decision was that the violence was concomitant with the taking.

[8] Barnes v. State, 9 Tex. App. 128. Where, by law, the winner of money at gaming is not entitled even to possession, it is not robbery for the loser to forcibly take it from him. Thompson v. Com. (Ky.) 18 S. W. 1022; Sikes v. Com. (Ky.) 34 S. W. 902. See, also, ante, p. 277.

[9] Rex v. Hall, 3 Car. & P. 409; People v. Hall, 6 Parker, Cr. R. (N. Y.) 642; People v. Hughes, 11 Utah, 100, 39 Pac. 492. For a person to compel another by threats to pay him money which he believes to be justly due him is not robbery. State v. Hollyway, 41 Iowa, 200, 20 Am. Rep. 586. And see State v. Brown, 104 Mo. 365, 16 S. W. 406; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242. See, also, ante, p. 297.

[10] Com. v. White, 133 Pa. 182, 19 Atl. 350, 19 Am. St. Rep. 628;

tort money through false imprisonment or threats of a criminal prosecution, except where the threat is to prosecute for an unnatural crime, for in that case the mere accusation, though false, would so injure a person that fear of it would naturally cause him to give up his property;[11] but it is otherwise if the threats are accompanied by force, actual or constructive, and the property is given up because of the force.[12] As in the case of larceny, the person robbed need not own the property. Possession is sufficient.[13] Consent to taking will prevent it from being robbery, for the intent must be to take the property under such circumstances that the taking, in the absence of force or intimidation, would be larceny.[14]

Woods v. State (Miss.) 6 South. 207; State v. O'Connor, 105 Mo. 121, 16 S. W. 510.

[11] 1 Russ. Crimes, 118, 119; Long v. State, 12 Ga. 293, at page 319; Britt v. State, 7 Humph. (Tenn.) 45; People v. McDaniels, 1 Parker, Cr. R. (N. Y.) 198; Thompson v. State (Neb.) 85 N. W. 62.

[12] Bussey v. State, 71 Ga. 100, 51 Am. Rep. 256; McCormick v. State, 26 Tex. App. 678, 9 S. W. 277; Sweat v. State, 90 Ga. 315, 17 S. E. 273.

[13] Stegar v. State, 39 Ga. 583, 99 Am. Dec. 472; Durand v. People, 47 Mich. 332, 11 N. W. 184; Com. v. Clifford, 8 Cush. (Mass.) 215; State v. Hobgood, 46 La. Ann. 855, 15 South. 406. See, also, ante, p. 277.

[14] Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295. See, also, ante, p. 281.

RECEIVING STOLEN GOODS.

108. Receiving stolen goods is possibly a substantive misdemeanor at common law, but this is doubtful. It is very generally made a crime by statute.

109. To constitute the crime

(a) The property must have been stolen, and must retain such character when received.

(b) It must be taken into the possession, though not necessarily manual possession, of the receiver, with the consent of the person from whom it is received.

(c) The receiver must know that it was stolen.

(d) The receiver must have felonious intent.

It seems probable that at common law one who received stolen goods knowing them to have been stolen was only guilty of a misprision or compounding of a felony, and afterwards, under an English statute, as accessary after the fact to the larceny,[1] though there is authority for saying that the reception of stolen goods was a substantive misdemeanor at common law.[2] There are now, however, in England, and doubtless in all the states, statutes making the receiving a substantive offense if the recipient knows the goods were stolen.

The character of the goods as stolen must exist at the time they are received.[3] If the goods were not in fact stolen, or if they have come again into the owner's possession, and are given to another to sell, for the purpose of entrapping or any other purpose, one who receives them is not guilty, though he may believe them stolen.[4] As has

§§ 108–109. [1] 2 Bish. New Cr. Law, § 1137.

[2] 1 Hale, P. C. 620; Fost. Cr. Law, 373; 1 Whart. Cr. Law, § 982; People v. Reynolds, 2 Mich. 422.

[3] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[4] Reg. v. Dolan, 6 Cox, Cr. Cas. 449; U. S. v. De Bare, 6 Biss. 358, Fed. Cas. No. 14,935; People v. Montague, 71 Mich. 318, 39 N. W.

been seen, one who takes stolen goods from one who has himself stolen them commits larceny from the thief if the requisite elements of intent and trespass are present. The receiving, therefore, must be with the consent of the person from whom the goods are received.[5] Receiving goods from one who guiltily received them from the thief has been held not to be receiving stolen goods, as in the first receiver's hands the goods are not stolen.[6] The fact that one who receives stolen goods also assisted in the theft does not prevent his punishment for receiving.[7] Some statutes make it a crime to receive not only stolen goods, but goods embezzled or obtained by false pretenses.[8] A wife does not commit the crime by receiving stolen goods from her husband, but the husband may do so in receiving from her.

The goods must be received into the possession of the recipient, but need not be received into his manual possession.[9] Taking them into his constructive possession is sufficient.[10] Where stolen goods were delivered, in the de-

60; Reg. v. Schmidt, 10 Cox, Cr. Cas. 172; Reg. v. Villensky [1892], 2 Q. B. 597; Reg. v. Hancock, 14 Cox, Cr. Cas. 119.

[5] Reg. v. Wade, 1 Car. & K. 739.

[6] State v. Ives, 35 N. C. 338; U. S. v. De Bare, 6 Biss. 358, Fed. Cas. No. 14,935. Contra, Levi v. State, 14 Neb. 1, 14 N. W. 543. And see Reg. v. Reardon, L. R. 1 Cr. Cas. 31; Smith v. State, 59 Ohio St. 350, 52 N. E. 826; 2 Bish. New Cr. Law, § 1140.

[7] Jenkins v. State, 62 Wis. 49, 21 N. W. 232. See, also, Whiting v. State, 48 Ohio St. 220, 27 N. E. 96.

[8] In Massachusetts, receiving property knowing it to have been stolen is an offense distinct from receiving property knowing it to have been embezzled. Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485.

[9] Reg. v. Smith, 1 Dears. Cr. Cas. 494, 6 Cox, Cr. Cas. 554; Reg. v. Wiley, 14 Cox, Cr. Cas. 412; State v. St. Clair, 17 Iowa, 149; Com. v. Light, 195 Pa. 220, 45 Atl. 933.

[10] Reg. v. Miller, 6 Cox, Cr. Cas. 353 (receipt by servant by command of master).

fendant's absence, to his wife, who paid 6d. on account, but the amount to be paid was not fixed until the thief and the defendant met and agreed thereon, when the defendant paid the balance, he was held guilty of receiving; the receipt, until the thief and the defendant agreed, not being complete.[11] So, also, where one partner, without his copartner's knowledge, receives stolen goods, knowing them to be stolen, and his copartner afterwards, with like knowledge, takes charge of them, both are guilty.[12]

As in case of larceny, and the other crimes which we have discussed in this chapter, so, also, in case of receiving stolen goods, there must be felonious intent. One who receives goods, though knowing them to have been stolen, is not guilty, if his purpose is to return them to the owner, or merely to detect the thief.[13] It is not necessary, however, that the recipient shall reap, or expect to reap, any benefit to himself from the goods. It is sufficient if he merely intends to aid the thief by concealment.[14] In all cases, knowledge at the time the goods are received that they have been

[11] Reg. v. Woodward, 9 Cox, Cr. Cas. 95. It was said by Wilde, B., that by ratifying the defendant made the first act of receiving by the wife his act, but it is doubtful whether the decision can be sustained on that ground. Ante, p. 118.

[12] Sanderson v. Com. (Ky.) 12 S. W. 136.

[13] People v. Johnson, 1 Parker, Cr. R. (N. Y.) 564; Arcia v. State, 26 Tex. App. 193, 9 S. W. 685. Otherwise with intent to require a reward for return. Baker v. State, 58 Ark. 513, 25 S. W. 603.

[14] Rex v. Richardson, 6 Car. & P. 335; Com. v. Bean, 117 Mass. 141; State v. Rushing, 69 N. C. 29, 12 Am. Rep. 641. Otherwise under statutes requiring receipt for "gain" of receiver. Aldrich v. People, 101 Ill. 16. In Michigan, and probably in other states, the crime is enlarged to include aiding the thief to conceal the property. People v. Reynolds, 2 Mich. 422. In Iowa it is held not to be necessary to show guilty intent further than to show knowledge that goods were stolen. State v. Smith, 88 Iowa, 1, 55 N. W. 16.

stolen is absolutely essential;[15] but knowledge may always be inferred from the circumstances, and is sufficiently shown if the circumstances proven are such as must have made the recipient believe they were stolen.[16]

It has been held that the fact that the goods were stolen in another state is immaterial on the ground that, the original taking being felonious, every act of possession continued under it by the thief is a felonious taking.[17] But the correctness of this may be doubted. In England it has been held that the crime of receiving is not committed if the goods were stolen outside the kingdom.[18] In some states there are statutes making it a crime to receive goods brought into the state from another state where they were stolen.

MALICIOUS MISCHIEF.

110. Malicious mischief is a misdemeanor at common law, and, though there is much conflict in the authorities, may be generally defined as any willful physical injury to property from ill will or resentment towards the owner, or, as held by some courts, from wantonness, and not animo furandi, as in case of larceny.[1]

[15] Reg. v. Adams, 1 Fost. & F. 86; Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485; Tolliver v. State, 25 Tex. App. 600, 8 S. W. 806; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505.

[16] Collins v. State, 33 Ala. 434, 73 Am. Dec. 426; Reg. v. White, 1 Fost. & F. 665; Murio v. State, 31 Tex. Cr. R. 210, 20 S. W. 356. Knowledge, not suspicion. State v. Goldman (N. J. Sup.) 47 Atl. 641.

[17] Com. v. Andrews, 2 Mass. 14; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[18] Reg. v. Madge, 9 Car. & P. 29; Reg. v. Carr, 15 Cox, Cr. Cas. 129. Post, p. 425.

§ 110. [1] State v. Robinson, 20 N. C. 130, 32 Am. Dec. 661. For an exhaustive review of this subject, and the cases, see Benn. & Heard, Cr. Cas. 22 et seq., and monographic note on malicious mischief at common law and by statute in 32 Am. Dec. 662–671.

There is no doubt that malicious mischief is a common-law crime, except where the common law has been superseded by statute. It has been so superseded in England by statutes protecting almost every conceivable article of property; and this is so, though to much less extent, in this country. There are, however, with us numerous cases recognizing the common-law crime,[2] but they are in irreconcilable conflict. Some of the courts hold that the property must be personal, and in most cases it is personal; but Lord Coke states that it is a common-law crime to deface tombs and monuments, though they are real estate;[3] and it has been held a common-law crime to maliciously injure trees,[4] and to tear off and carry away copper attached to the freehold.[5] It has been held that a dog has money value, and that a person may therefore be made criminally liable for killing it.[6] Malicious mischief is distinguished from larceny by the absence of the animus furandi essential to that crime. To constitute the crime, malice is essential, and must be directed against the owner of the property, and not merely against the property or against a third person.

[2] People v. Moody, 5 Parker, Cr. R. (N. Y.) 568; State v. Watts, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216; Respublica v. Teischer, 1 Dall. (Pa.) 335, 1 L. Ed. 163; People v. Smith, 5 Cow. (N. Y.) 258. In State v. Manuel, 72 N. C. 201, 21 Am. Rep. 455, it was held that to maliciously wound an animal, and not kill it, was not indictable at common law; that an indictment would lie for no malicious injury to property short of its destruction, any injury short of this being a mere civil trespass. See, also, State v. Beekman, 27 N. J. Law, 124, 72 Am. Dec. 352, and Reg. v. Wallace, 1 Craw. & D. 403.

[3] 3 Co. Inst. 202.

[4] Com. v. Eckert, 2 Browne (Pa.) 249.

[5] Rex v. Joyner, J. Kel. 29.

[6] Nehr v. State, 35 Neb. 638, 53 N. W. 589, 17 L. R. A. 771; State v. Latham, 35 N. C. 33. Contra, U. S. v. Gideon, 1 Minn. 292 (Gil. 226).

It has been said that the injury must be done "either out of a spirit of wanton cruelty or wicked revenge," and that the mere willful infliction of injury is not enough, without further proof, to show "malice" as the term is used in the statutes defining "malicious mischief." [7] A person may, under some circumstances, be justified in injuring animals, as, for instance, where it is necessary to protect his property; and, if he has ineffectually used ordinary care to otherwise protect his property, the injury will not be deemed willful or wanton.[8] Nor can a person be deemed to have acted maliciously where he acted in good faith, under an honest claim of right; as, for instance, when he destroys another's crop, believing in good faith that he owns the land, and intending to plant a crop for himself; for, as said in an Indiana

[7] Com. v. Walden, 3 Cush. (Mass.) 558, citing 4 Bl. Comm. 244; Garrett v. Greenwell, 92 Mo. 120, 4 S. W. 441; State v. Wilcox, 3 Yerg. (Tenn.) 278, 24 Am. Dec. 569; State v. Robinson, 20 N. C. 130, 32 Am. Dec. 661. Contra, Territory v. Crozier, 6 Dak. 8, 50 N. W. 124. Malice may sometimes be inferred from the nature of the injury, and the manner in which it is inflicted. People v. Burkhardt, 72 Mich. 172, 40 N. W. 240; State v. Williamson, 68 Iowa, 315, 27 N. W. 259; People v. Keeley, 81 Cal. 210, 22 Pac. 593; People v. Olsen, 6 Utah, 284, 22 Pac. 163 (where it was held that the accused need not have known the owner of the property). And see, to same effect, State v. Linde, 54 Iowa, 139, 6 N. W. 168; State v. Phipps, 95 Iowa, 491, 64 N. W. 411. In prosecution for malicious mischief in injuring a house, malice against the owner was not essential, where the purpose was to commit a crime against one who had taken refuge therein. Funderburk v. State, 75 Miss. 20, 21 South. 658. See State v. Gilligan (R. I.) 50 Atl. 844.

[8] Wright v. State, 30 Ga. 325, 76 Am. Dec. 656; Farmer v. State, 21 Tex. App. 423, 2 S. W. 767; Woods v. State, 27 Tex. App. 586, 11 S. W. 723; People v. Kane, 131 N. Y. 111, 29 N. E. 1015, 27 Am. St. Rep. 574. Mere trespass by an animal, however, without more, is no excuse for killing it. Snap v. People, 19 Ill. 80, 68 Am. Dec. 582.

case, the machinery of the criminal law is not to be set in motion to redress merely private grievances, or to settle questions of property, where honest differences of opinion are involved.[9]

FORGERY.

111. Forgery, at common law, is the fraudulent making or alteration of a writing to the prejudice of another man's right.[1]

112. To constitute the crime

(a) The making or alteration must be false.

(b) It must be with intent to defraud.

(c) The instrument, as made or altered, must be of apparent legal efficacy to impose a liability, or, in case of alteration, to change a liability.

(d) The alteration must therefore be material.

113. Forgery is a misdemeanor at common law, but is very generally made a felony by statute.[2]

The Making.

The instrument need not be written with pen or pencil,[3] but may be wholly printed or engraved, as in case of a railroad or theater ticket.[4] Indeed, it has been said that the instrument need not even be a document, though there are cases holding the contrary. Thus, it has been held forgery to take an impression of a note on glass, for the purpose of

[9] Barlow v. State, 120 Ind. 56, 22 N. E. 88; Woodward v. State, 33 Tex. Cr. R. 554, 28 S. W. 204; State v. Foote, 71 Conn. 737, 43 Atl. 488. But see Heron v. State, 22 Fla. 86.

§§ 111–113. [1] 4 Bl. Comm. 247. "Forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 2 Bish. New Cr. Law, § 523.

[2] 2 Bish. New Cr. Law, § 609.

[3] Baysinger v. State, 77 Ala. 63, 54 Am. Rep. 46.

[4] Com. v. Ray, 3 Gray (Mass.) 446; In re Benson (C. C.) 34 Fed. 649.

photographing it;[5] and Mr. Wharton states that it would be forgery for a baker to cut false notches in a stick, for the purpose of showing delivery of more loaves than he in reality delivered, the stick being kept as a tally.[6] The crime may be committed by writing or printing matter over another's genuine signature, as well as by signing another's name.[7] Making another's mark, instead of signing his name, may be a forgery.[8] The crime may also be committed by signing one's own name in such a way as to make the writing purport to be by another person of the same or a similar name,[9] or by signing the name of a fictitious [10] or deceased person,[11] or person without legal capacity,[12] as the name of

[5] Reg. v. Rinaldi, Leigh & C. 330, 9 Cox, Cr. Cas. 391.

[6] 1 Whart. Cr. Law, § 681.

[7] Caulkins v. Whisler, 29 Iowa, 495, 4 Am. Rep. 236; Roberts v. State, 92 Ga. 451, 17 S. E. 262.

[8] Rex v. Dunn, 2 East, P. C. 962. There may be forgery, though place for mark left blank. Lemasters v. State, 95 Ind. 367.

[9] Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; People v. Peacock, 6 Cow. (N. Y.) 72; Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49; U. S. v. Long (C. C.) 30 Fed. 678; State v. Farrell, 82 Iowa, 553, 48 N. W. 940; People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

[10] Rex v. Lockett, 1 Leach, 110; Sasser v. State, 13 Ohio, 453; People v. Davis, 21 Wend. (N. Y.) 309; State v. Wheeler, 20 Or. 192, 25 Pac. 394, 10 L. R. A. 779, 23 Am. St. Rep. 119; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 778; People v. Warner, 104 Mich. 337, 62 N. W. 405. When name fictitious, Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

[11] Henderson v. State, 14 Tex. 503; Billings v. State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 778. Name of corporation no longer in existence, Buckland v. Com., 8 Leigh (Va.) 734; White v. Com., 4 Bin. (Pa.) 418.

[12] Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 778; People v. Krummer, 4 Parker, Cr. R. 217; King v. State (Tex. Cr. App.) 57 S. W. 840.

such person. It seems, however, that it is not forgery for one to sign a fictitious name if he signs it as his own,[13] though the contrary has also been held.[14] Signing as agent of another without authority is not forgery, since the making or alteration must be false, and this is a mere assumption of authority.[15] Hence it is not forgery for a person falsely to sign his own name and the name of another as a pretended partnership.[16] Signing by making an impression with a stamp is such a signature as may constitute the crime.[17] There must be some making or alteration of an instrument, and therefore it would not be forgery to make use of an instrument, such as an order for the payment of money, or a check, which is genuine, but by mistake is drawn for more money than is intended.[18] So, also, it has been held not to be forgery to fraudulently write out a note or deed for an illiterate person for more than he intends, and then, by falsely reading it over to him, obtain his signature.[19] A person may be authorized to sign another's name, or fill in blanks over his signature, and yet may do so fraudulently, so as to be guilty of forgery; as, for instance, where a person authorized to sign another's name to certificates signs a false

[13] Reg. v. Martin, 14 Cox, Cr. Cas. 375, 5 Q. B. Div. 34.

[14] State v. Wheeler, 20 Or. 192, 25 Pac. 394, 10 L. R. A. 779, 23 Am. St. Rep. 119.

[15] Reg. v. White, 2 Cox, Cr. Cas. 210; State v. Willson, 28 Minn. 52, 9 N. W. 28; In re Tully (C. C.) 20 Fed. 812; State v. Taylor, 46 La. Ann. 1332, 16 South. 190, 25 L. R. A. 591, 49 Am. St. Rep. 351.

[16] 1 Hawk. P. C. c. 70, § 5; Com. v. Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703.

[17] In re Benson (C. C.) 34 Fed. 649.

[18] Bell v. State, 21 Tex. App. 270, 17 S. W. 155.

[19] Wells v. State, 89 Ga. 788, 15 S. E. 679; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; Com. v. Sankey, 22 Pa. 390, 60 Am. Dec. 91. But see State v. Shurtliff, 18 Me. 368; Clay v. Schwab. 1 Mich. N. P. 168.

certificate,[20] or where a person who is authorized to fill up checks signed in blank, and use them in his principal's business for a particular purpose, fills them up for an arbitrary amount, and appropriates it.[21] In the latter case it would not be forgery if the agent had a general authority to fill up the checks, but would be embezzlement.[22] The fact that the forged instrument does not resemble the genuine, provided the instrument can reasonably deceive, is immaterial except so far as the fact of dissimilarity may bear on the question of intent.[23] A person who directs the forging of an instrument by an innocent agent, or probably even by a responsible agent, and utters the same, and receives the proceeds, is a principal forger.[24]

Character of Instrument.

According to the weight of authority the subject of a forgery must be some writing or document, but beyond this the character of the instrument is not material, provided that, if genuine, it might be of apparent legal efficacy and might prejudice another's rights. The subject of forgery may be

[20] Moore v. Com., 92 Ky. 630, 18 S. W. 833.

[21] Reg. v. Hart, 7 Car. & P. 652; Hooper v. State, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; People v. Dickie, 62 Hun, 400, 17 N. Y. Supp. 51. And see State v. Maxwell, 47 Iowa, 454; Biles v. Com., 32 Pa. 529, 75 Am. Dec. 568; State v. Kroeger, 47 Mo. 552; State v. Flanders, 38 N. H. 324.

[22] Reg. v. Richardson, 2 Fost. & F. 343; People v. Reinitz, 7 N. Y. Cr. R. 71, 6 N. Y. Supp. 672.

[23] Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154; State v. Gryder, 44 La. Ann. 962, 11 South. 573, 32 Am. St. Rep. 358; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767.

[24] Territory v. Barth (Ariz.) 15 Pac. 673; Elmore v. State, 92 Ala. 51, 9 South. 600; Hughes v. Com., 89 Ky. 227, 12 S. W. 269; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774.

a deed[25] or a mortgage,[26] a check or note or bill of exchange,[27] an order for goods or money,[28] a duebill,[29] a recommendation,[30] a testimonial of good character,[31] entries in account books,[32] or receipts[33] and settlements.[34] As

[25] Allgood v. State, 87 Ga. 668, 13 S. E. 569.

[26] People v. Sharp, 53 Mich. 523, 19 N. W. 168.

[27] Rex v. Birkett, Russ. & R. 86; Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154; Butler v. Com., 12 Serg. & R. (Pa.) 237, 14 Am. Dec. 679; State v. Coyle, 41 Wis. 267; Com. v. Ward, 2 Mass. 397.

[28] Stewart v. State, 113 Ind. 505, 16 N. E. 186; Hendricks v. State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; Rollins v. State, 22 Tex. App. 548, 3 S. W. 759, 58 Am. St. Rep. 659; Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766; Reddick v. State, 31 Tex. Cr. R. 587, 21 S. W. 684; State v. Jefferson, 39 La. Ann. 331, 1 South. 669; State v. Stephen, 45 La. Ann. 702, 12 South. 883; Smith v. State, 29 Fla. 408, 10 South. 894; Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 490; Baysinger v. State, 77 Ala. 63, 54 Am. Rep. 46. The fact that order is signed at beginning is immaterial. Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766. Failure to name drawee and payee immaterial. State v. Bauman, 52 Iowa, 681, 2 N. W. 956.

[29] Nelson v. State, 82 Ala. 44, 2 South. 463.

[30] Reg. v. Sharman, Dears. Crown Cas. 285; State v. Ames, 2 Greenl. (Me.) 365; Com. v. Coe, 115 Mass. 481. Contra, Waterman v. People, 67 Ill. 91 (false letter of introduction to hospital).

[31] Reg. v. Toshack, 1 Denison, Cr. Cas. 492.

[32] Biles v. Com., 32 Pa. 529, 75 Am. Dec. 568; In re Tully (C. C.) 20 Fed. 812. Entry in bank pass book, Reg. v. Smith, Leigh & C. 168. False charge in one's own account books not forgery. State v. Young, 46 N. H. 266, 88 Am. Dec. 212.

[33] Snell v. State, 2 Humph. (Tenn.) 347; State v. Floyd, 5 Strob. (S. C.) 58, 53 Am. Dec. 689; State v. Smith, 46 La. Ann. 1433, 16 South. 372. Indorsement of receipt on back of note, State v. Davis, 53 Iowa, 252, 5 N. W. 149. Not forgery to erase acquittance indorsed on bond. State v. Thornburg, 28 N. C. 79, 44 Am. Dec. 67.

[34] Settlement of book account, Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

stated in the preceding section, it has been said that the instrument need not be even a document, though this is very doubtful. In England it was held not to be forgery for one seller of goods to imitate the labels of another,[35] nor for a person to falsely paint the name of a well-known artist in the corner of a picture, so as to make it appear to have been painted by him.[36] In the latter case, Cockburn, C. J., said: "If you once go beyond a writing, where are you to stop? Could there be a forgery of sculpture? * * * A forgery must be of some document or writing." But, on the other hand, it has been held forgery in England to take an impression of a note on glass, for the purpose of photographing it.[37] The rule, no doubt, is that the instrument must be a document, and the cases to the contrary are departures which confound forgery with cheating and obtaining goods by false pretenses. Forgery is only one way of cheating, and there must be the making or alteration of some writing or document.[38]

Legal Efficacy of Instrument.

The instrument must be of apparent legal efficacy,[39] since otherwise it has no legal tendency to defraud. If an instrument does not appear on its face to be of legal efficacy, it cannot be punished as a forgery without proof of extrinsic facts to show that, if genuine, it would have such efficacy.

[35] Reg. v. Smith, 8 Cox, Cr. Cas. 32. See White v. Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

[36] Reg. v. Closs, 7 Cox, Cr. Cas. 494.

[37] Reg. v. Rinaldi, 9 Cox, Cr. Cas. 391.

[38] It has been held forgery to sign employer's name to letter purporting to agree to hold back wages. Billups v. State, 88 Ga. 27, 13 S. E. 830.

[39] Com. v. Hinds, 101 Mass. 209; People v. Shall, 9 Cow. (N. Y.) 778; People v. Drayton, 168 N. Y. 10, 60 N. E. 1048. Cases holding a letter of recommendation or testimonial of good character (see notes 30, 31) subjects of forgery are, to say the least, extreme cases.

Making a writing which is invalid on its face, as in case of a will not signed by the requisite number of witnesses,[40] or writing the name of a witness on a paper not required to be witnessed,[41] is not forgery. Nor is it forgery to counterfeit a bank note which the statute declares void, as no one could be defrauded, all persons being presumed to know the law.[42] If, however, an instrument is valid on its face, and is rendered invalid only because of extrinsic facts, it may be the subject of forgery, as people are not presumed to know the facts.[43] Thus forgery may be committed by signing the name of a fictitious person, or of a deceased person, or of a person without legal capacity.[44] On the other hand, although an instrument does not, on its face, appear to be of legal efficacy, it may yet be shown to be a forgery by averment in the indictment and proof of such extrinsic facts as may show that, if it were genuine, it would possess legal efficacy.[45] To make or alter a note which on its face appears to be, or to alter a note that is, barred by the statute

[40] Rex v. Wall, 2 East, P. C. 953; State v. Smith, 8 Yerg. (Tenn.) 150.

[41] State v. Gherkin, 29 N. C. 206.

[42] 2 Bish. New Cr. Law, § 538. Bond not executed in conformity with statute. Cunningham v. People, 4 Hun (N. Y.) 455. Instrument prohibited under penalty not void, and may be subject of forgery. Nelson v. State, 82 Ala. 44, 2 South. 463. See, also, Thompson v. State, 9 Ohio St. 354; Butler v. Com., 12 Serg. & R. (Pa.) 237, 14 Am. Dec. 679; Brown v. People, 8 Hun (N. Y.) 562. But see, contra, Gutchins v. People, 21 Ill. 642.

[43] People v. Galloway, 17 Wend. (N. Y.) 540; State v. Hilton, 35 Kan. 338, 11 Pac. 164; State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158. Insurance premium note to be valid when policy issued, policy not issued, State v. McMackin, 70 Iowa, 281, 30 N. W. 635. Usurious bill of exchange, People v. Wheeler, 47 Hun (N. Y.) 484.

[44] Ante, p. 334.

[45] Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; Com. v. Ray, 3 Gray (Mass.) 441; State v. Wheeler, 19 Minn. 98 (Gil. 70).

of limitations, would be a forgery, as the maker of a note is not bound to plead the statute; and, in the absence of such a plea, a judgment could be rendered against him.[46]

Alterations and Erasures.

Alterations must be material, or they cannot be prejudicial.[47] Erasures may be forgeries, but not erasures of immaterial matter. Nor is it forgery to add immaterial matter, such, for instance, as words which, if absent, would

[46] State v. Dunn, 23 Or. 562, 32 Pac. 621, 37 Am. St. Rep. 704. Other cases, not forgery. Contract invalid for want of consideration, People v. Shall, 9 Cow. (N. Y.) 778; married woman's deed, void for want of acknowledgment, Roode v. State, 5 Neb. 174, 25 Am. Rep. 475; note appearing on its face not to be executed by person represented, Rudicel v. State, 111 Ind. 595, 13 N. E. 114; mistake in name intended to be signed, People v. Elliott, 90 Cal. 586, 27 Pac. 433; but forgery where name is misspelled, State v. Covington, 94 N. C. 913, 55 Am. Rep. 650. Unintelligible writing not forgery, Terry v. Com., 87 Va. 672, 13 S. E. 104; otherwise where orthography merely bad, Williams v. State, 24 Tex. App. 342, 6 S. W. 531; or penmanship bad, Hagar v. State, 71 Ga. 164. Failure of a forged ticket to express consideration or promise is immaterial. In re Benson (C. C.) 34 Fed. 649. Affidavits not required by law not forgery. U. S. v. Barnhart (D. C.) 33 Fed. 459. Making false tax receipts, where taxes have in fact been paid, not forgery, Cox v. State, 66 Miss. 14, 5 South. 618; nor in case of void city warrants, Raymond v. People, 2 Colo. App. 329, 30 Pac. 504; nor contract for purchase of goods, providing for future delivery and payment, Shirk v. People, 121 Ill. 61, 11 N. E. 888.

[47] Immaterial alteration of receipt, State v. Dorrance, 86 Iowa, 428, 53 N. W. 281; State v. Riebe, 27 Minn. 315, 7 N. W. 262; of will, State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282; alteration by drawer of satisfied and returned order for goods, People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; unsigned indorsement of money received, on back of note, State v. Davis, 53 Iowa, 252, 5 N. W. 149. It was held forgery to alter satisfied mortgage, State v. Adamson, 43 Minn. 196, 45 N. W. 152; instrument signed in blank, State v. Kroeger, 47 Mo. 552.

be implied by law,[48] or to add the name of a witness to a paper to which witnesses are not required.[49] Examples of forgery by alteration are where the date,[50] or amount, or place of payment [51] of a note is changed, or signatures are erased and substituted,[52] or where the condition of a note is torn off, so as to render it negotiable.[53] Altering one's own note after it has been delivered may be a forgery.[54] Of course, it is not forgery to alter an instrument which is not the subject of forgery, and therefore what has been said in the preceding sections is also applicable here.

Intent.

Fraudulent intent is essential to constitute this crime.[55] It is no forgery for one to carelessly write another's name without any purpose, or to insert in a contract which has been signed a provision which he understands the other party to have agreed to.[56] On the other hand, if a fraudulent intent is shown, it is no defense that, as in case of a note, the accused intended to take up the instrument himself be-

[48] Hunt v. Adams, 6 Mass. 519.

[49] State v. Gherkin, 29 N. C. 206.

[50] State v. Kattlemann, 35 Mo. 105; Allen v. State, 79 Ala. 34.

[51] Rex v. Treble, Russ. & R. 164, 2 Taunt. 328; White v. Hass, 32 Ala. 430, 70 Am. Dec. 548.

[52] Rex v. Treble, 2 Taunt. 328; State v. Robinson, 16 N. J. Law, 507. Indorsement on note, Powell v. Com., 11 Grat. (Va.) 822; Com. v. Welch, 148 Mass. 296, 19 N. E. 357; State v. Davis, 53 Iowa, 252, 5 N. W. 149; Pennsylvania v. Misner, Add. (Pa.) 44. Change of middle initial. State v. Higgins, 60 Minn. 1, 61 N. W. 816, 27 L. R. A. 74, 51 Am. St. Rep. 490.

[53] State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282.

[54] State v. Young, 46 N. H. 266, 88 Am. Dec. 212; Com. v. Mycall, 2 Mass. 136.

[55] Com. v. Connolly, 11 Pa. Co. Ct. R. 414.

[56] Pauli v. Com., 89 Pa. 432. Signing name of witness to fee bill in belief witness had agreed to give him fee. Kotter v. People, 150 Ill. 441, 37 N. E. 932.

fore it became due, and so prevent injury.[57] Nor is it any defense, on a prosecution for forgery by a creditor on his debtor, to show that defendant intended to devote the money obtained thereby to the payment of the debt.[58] It is not necessary that the forger shall intend to reap the advantage from the forgery himself, but one may commit a forgery for the benefit of another.[59] A general intent to defraud is sufficient to render a person guilty; there need be no intent to defraud any particular person.[60] Nor is it necessary that the forgery shall be successful, and actually defraud.[61]

[57] Reg. v. Geach, 9 Car. & P. 499; Reg. v. Birkett, Russ. & R. 86; Com. v. Henry, 118 Mass. 460.

[58] Reg. v. Wilson, 2 Car. & K. 527; Claiborne v. State, 51 Ark. 88, 9 S. W. 851.

[59] State v. White (N. C.) 7 S. E. 715.

[60] Com. v. Ladd, 15 Mass. 526; U. S. v. Long (C. C.) 30 Fed. 678; Arnold v. Cost, 3 Gill. & J. (Md.) 219, 22 Am. Dec. 302; Barnes v. Com., 101 Ky. 556, 41 S. W. 772.

[61] Com. v. Ladd, 15 Mass. 526; Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 488; State v. McMackin, 70 Iowa, 281, 30 N. W. 635; State v. Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; Hawkins v. State, 28 Fla. 363, 9 South. 652; State v. Washington, 1 Bay (S. C.) 120, 1 Am. Dec. 601; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477. Nonacceptance of forged order is immaterial. Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766. Check may be forgery, though person whose name signed has no account with bank. Com v. Russell, 156 Mass. 196, 30 N. E. 763.

UTTERING FORGED INSTRUMENT.

114. To utter a forged instrument is to offer it, directly or indirectly, by words or actions, as good. This, if done with intent to defraud, and with knowledge of the falsity of the instrument, being an attempt to cheat, is a misdemeanor at common law.[1]

To constitute the crime of uttering a forged instrument, there must be, not merely intent to defraud, but knowledge that the instrument is a forgery.[2] A representation by a person that he is the payee of a forged note is alone sufficient to show guilty knowledge.[3] Uttering is in the nature of an attempt to cheat by means of a forged instrument. The forgery is uttered when there is an attempt to make use of it. It is not necessary that there be anything more than the declaration that the instrument is good; it need not be actually accepted and passed.[4] Mere exhibition of the forgery may be enough, as by producing a forged receipt for inspection, in order to lead the person to whom it is produced to believe that the other has paid, and to gain credit.[5] Thus, to offer to pass a forged check has been held

§ 114. [1] 1 Whart. Cr. Law, §§ 703, 713; Com. v. Searle, 2 Bin. (Pa.) 332, 4 Am. Dec. 446; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Wash v. Com., 16 Grat. (Va.) 530.

[2] State v. Warren, 109 Mo. 430, 19 S. W. 191; Elsey v. State, 47 Ark. 572, 2 S. W. 337.

[3] State v. Beasley, 84 Iowa, 83, 50 N. W. 570.

[4] People v. Caton, 25 Mich. 392.

[5] Reg. v. Radford, 1 Denison, Cr. Cas. 59; Reg. v. Ion, 2 Denison, Cr. Cas. 475 (forged receipt exhibited by proposed surety to establish his credit). Exhibiting or delivering to an accomplice in order that he may make use of it is not uttering. Reg. v. Heywood, 2 Car. & K. 352. Pledging forged instrument held an uttering. Thurmond v. State, 25 Tex. App. 366, 8 S. W. 473. Recording forged discharge of mortgage an uttering, as "an acquittance and discharge for mon-

to be an uttering thereof, though it was not only not accepted, but was payable to the order of a third person, and had not been indorsed.[6] There must, however, be some attempt to cheat, or offer of the instrument. It is not at common law a crime to have a forged note in one's possession with intent to pass it, as the common law does not punish mere intention, though there are statutes now in the different states changing the common law in this respect. The representation that the instrument is good need not necessarily be in words. A mere silent offer of an instrument, knowing that it is forged, is a representation that it is genuine.[7] A person in one county or state is guilty of uttering a forged instrument in another county or state where he procures it to be taken into the latter by an innocent agent, and there collected or passed.[8] And placing a forgery in the mail for transmission to another jurisdiction is uttering.[9]

Uttering and forgery are not different degrees of the same offense, but are distinct offenses; although in some states by statute uttering is declared to be forgery.

ey." People v. Swetland, 77 Mich. 53, 43 N. W. 779. Aiding in obtaining probate of forged will an uttering. Corbett v. State, 5 Ohio Cir. Ct. R. 155. Presenting forged deed for record. Espalla v. State, 108 Ala. 38, 19 South. 82.

[6] Smith v. State, 20 Neb. 284, 29 N. W. 923, 57 Am. Rep. 832.

[7] U. S. v. Long (C. C.) 30 Fed. 678; State v. Calkins, 73 Iowa, 128, 34 N. W. 777.

[8] Reg. v. Taylor, 4 Fost. & F. 511.

[9] Reg. v. Finkelstein, 16 Cox, Cr. Cas. 107.

CHAPTER XII.

OFFENSES AGAINST THE PUBLIC HEALTH, SAFETY, COMFORT, AND MORALS.

NUISANCE IN GENERAL.

115. A common or public nuisance, which is a misdemeanor at common law, is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals, of the citizens at large, resulting either

(a) From an act not warranted by law, or

(b) From neglect of a duty imposed by law.

To constitute a public nuisance, the condition of things must be such as injuriously affects the community at large, and not merely one or even a very few individuals. To take an illustration already used, it is not a public nuisance to maintain a filthy pond, or dam up and render stagnant the waters of a creek, in the country, where the odors can reach a single neighbor or a few neighbors only, as his or their health and comfort only are affected; but it is other-

wise if it be maintained in a thickly-settled community, or near a public highway.[1]

Whatever tends to endanger life,[2] or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort,—is generally, at common law, a public nuisance, and a crime. Thus, it is a public nuisance to set spring guns in such a way as to endanger the lives of persons passing along a highway;[3] to manufacture or keep gunpowder in a settled locality in such a way as to endanger life;[4] to sell or expose for sale putrid, diseased, or unwholesome food;[5]

§ 115. [1] 4 Bl. Comm. 166; Com. v. Webb, 6 Rand. (Va.) 726; State v. Close, 35 Iowa, 570; People v. Townsend, 3 Hill (N. Y.) 479; Douglass v. State, 4 Wis. 387; Stoughton v. State, 5 Wis. 291; State v. Gainer, 3 Humph. (Tenn.) 39; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Neal v. Henry, Meigs (Tenn.) 17, 33 Am. Dec. 125; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; State v. Wolf, 112 N. C. 889, 17 S. E. 528.

[2] Running railroad trains across highway in reckless way, Louisville, C. & L. R. Co. v. Com., 80 Ky. 143, 44 Am. Rep. 468.

[3] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[4] Anon., 12 Mod. 342; Bradley v. People, 56 Barb. (N. Y.) 72; Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734. It has been held that it is not a crime unless the powder is negligently kept. People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296. This is too broad a statement, however, for in all cases the danger to the public is the test, and not the intent or the action of the accused, except as bearing on the question of danger. Myers v. Malcolm, 6 Hill (N. Y.) 292, 41 Am. Dec. 744; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; People v. White-Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

[5] 4 Bl. Comm. 162; Rex v. Dixon, 3 Maule & S. 11; Goodrich v. People, 19 N. Y. 574, affirming 3 Parker, Cr. R. (N. Y.) 622; State v. Norton, 24 N. C. 40; Hunter v. State, 1 Head (Tenn.) 160, 73 Am. Dec. 164; State v. Snyder, 44 Mo. App. 429.

to pollute drinking water;[6] to expose either a live person or a corpse or a beast that is infected with a contagious disease;[7] to disturb public rest on Sunday;[8] to exhibit disgusting or indecent books or pictures;[9] to maintain an offensive trade or industry, such as a tannery, distillery, or slaughter house, in a populous community.[10] There are also

[6] State v. Buckman, 8 N. H. 203, 29 Am. Dec. 646; State v. Taylor, 29 Ind. 517.

[7] Rex v. Burnett, 4 Maule & S. 272; Rex v. Vantandillo, 4 Maule & S. 73.

[8] Parker v. State, 16 Lea (Tenn.) 476, 1 S. W. 202. Keeping shop open on Sunday not a nuisance. State v. Lorry, 7 Baxt. (Tenn.) 95, 32 Am. Rep. 555. Contra. Com. v. Jacobus, 1 Pa. Leg. Gaz. 491; Phillips v. Innes, 4 Clark & F. 234. See note in 32 Am. Rep. 557. Playing baseball on Sunday at an isolated place not a nuisance. Com. v. Meyers (Pa. Com. Pl.) 8 Pa. Co. Ct. R. 435.

[9] Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; Reg. v. Grey, 4 Fost. & F. 73. Under statutes declaratory of common law, Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652; People v. Muller, 96 N. Y. 408, 48 Am. Rep. 635.

[10] Rex v. Cross, 2 Car. & P. 483; Com. v. Upton, 6 Gray (Mass.) 473; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; State v. Kaster, 35 Iowa, 221; State v. Neidt (N. J. Ch.) 19 Atl. 318; Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170; People v. White-Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. Coal shed, noise and coal dust, Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. Rep. 673. It is not necessary that the smell be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable. Rex v. White, 1 Burrows, 333; Catlin v. Valentine, 9 Paige (N. Y.) 575, 38 Am. Dec. 567; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737. Maintenance by licensee of commonwealth, work of internal improvement, Com. v. Reed, 34 Pa. 275, 75 Am. Dec. 661. Hogpen in city, Com. v. Perry, 139 Mass. 198, 29 N. E. 656; Gay v. State, 90 Tenn. 645, 18 S. W. 260, 25 Am. St. Rep. 707. License by board of health no defense. Garrett v. State, 49 N. J. Law, 94, 7 Atl. 29, 60 Am. Rep. 592. Fact that business of render-

nuisances in personal deportment, such as common brawlers, common scolds,[11] common barrators,[12] open and notorious drunkenness,[13] indecent and public exposure of the person, or open and notorious lewdness,[14] eavesdropping,[15] and profane language, ribald songs, and blasphemy.[16] Disorderly houses, including houses of ill fame and drinking or tippling houses, kept in such a way as to annoy and scandalize the public, are nuisances at common law,[17] though now they

ing dead animals is of great public convenience is no defense. Seacord v. People, 121 Ill. 623, 13 N. E. 194.

[11] 4 Bl. Comm. 168; James v. Com., 12 Serg. & R. (Pa.) 220; Com. v. Mohn, 52 Pa. 243, 91 Am. Dec. 153.

[12] Post, p. 376.

[13] State v. Waller, 7 N. C. 229. Private drunkenness not a crime. State v. Locker, 50 N. J. Law, 512, 14 Atl. 749; Hutchinson v. State, 5 Humph. (Tenn.) 142.

[14] Reg. v. Farrell, 9 Cox, Cr. Cas. 446; Grisham v. State, 2 Yerg. (Tenn.) 589; Knowles v. State, 3 Day (Conn.) 103, 108; State v. Rose, 32 Mo. 560; State v. Roper, 18 N. C. 208. Indecent exposure by a man to one woman only has been held "open and gross lewdness and lascivious behavior," within meaning of statute, for which an indictment will lie. State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; Fowler v. State, 5 Day (Conn.) 81. Contra, doubtless, at common law. Reg. v. Watson, 2 Cox, Cr. Cas. 276; Reg. v. Webb, 1 Denison, Cr. Cas. 338. Indecent exposure in public place need not be actually seen. It is enough if persons were present and might have seen it. Van Houton v. State, 46 N. J. Law, 16, 50 Am. Rep. 397; Reg. v. Holmes, 6 Cox, Cr. Cas. 216.

[15] 4 Bl. Comm. 168; State v. Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771; State v. Williams, 2 Overt. (Tenn.) 108.

[16] State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; State v. Powell, 70 N. C. 67; State v. Toole, 106 N. C. 736, 11 S. E. 168; Bell v. State, 1 Swan (Tenn.) 42; State v. Graham, 3 Sneed (Tenn.) 134; Com. v. Linn, 158 Pa. 22, 27 Atl. 843, 22 L. R. A. 353. Single act of profanity not enough. Gaines v. State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64.

[17] State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; State v. Haines, 30 Me. 65; King v. People, 83 N. Y. 587; Thatcher v.

are very generally regulated by statute. Private gambling is not a nuisance at common law, but a gambling house becomes so if it is conducted openly and notoriously.[18] In most, if not all, the states, there are particular statutes covering the subject and prohibiting gaming. Obstructing a public highway is a nuisance,[19] and this includes navigable rivers, which are considered highways.[20]

State, 48 Ark. 60, 2 S. W. 343; Price v. State, 96 Ala. 1, 11 South. 128. Barroom and dance hall, Beard v. State, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536.

[18] Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; Com. v. Tilton, 8 Metc. (Mass.) 232; Com. v. Stahl, 7 Allen (Mass.) 305; People v. Jackson, 3 Denio (N. Y.) 101, 45 Am. Dec. 449; Bloomhuff v. State, 8 Blackf. (Ind.) 205; State v. Crummey, 17 Minn. 72 (Gil. 50). Place where public may bet on horse racing held a common nuisance at common law. McClean v. State, 49 N. J. Law, 471, 9 Atl. 681; Haring v. State, 51 N. J. Law, 386, 17 Atl. 1079. Stock gambling house a disorderly house. Kneffler v. Com., 94 Ky. 359, 22 S. W. 446.

[19] Hall's Case, 1 Vent. 169; People v. Cunningham, 1 Denio (N. Y.) 524, 43 Am. Dec. 709; Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123. Even a public officer may be indicted for obstructing a highway; as, for instance, where a constable blocks up the sidewalk with goods which he is selling at public auction. Com. v. Milliman, 13 Serg. & R. (Pa.) 403. It is not a nuisance for a merchant to temporarily obstruct the sidewalk in receiving or sending out goods, or for a person to place building materials in the street while he is building a house, but the street must be used in a reasonable manner, so as to cause as little inconvenience to the public as possible. Com. v. Passmore, 1 Serg. & R. (Pa.) 219. Unreasonable obstructions, Cohen v. City of New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506. Running traction engine to and fro on highway a nuisance. Com. v. Allen, 148 Pa. 358, 23 Atl. 1115, 16

[20] Reg. v. Stephens, L. R. 1 Q. B. 702; Hart v. Mayor, etc., 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Stump v. McNairy, 5 Humph. (Tenn.) 363, 42 Am. Dec. 437; State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618.

As was stated in the black-letter text, a nuisance may be caused by an omission to perform a legal duty.[21] Such is the case where a person charged with the duty of repairing a highway neglects to do so.[22] The intent of the person maintaining a nuisance which is dangerous or offensive to the public is entirely immaterial. If he causes or suffers the nuisance, and the public is so prejudiced, the offense is complete; for every man is presumed to intend the natural and probable consequences of his acts.[23]

Justification.

It is, as a rule, no justification that the public is benefited as well as injured, as that a business is useful or necessary,

L. R. A. 148, 33 Am. St. Rep. 830. Bill board on sidewalk a nuisance. City of Wilkes Barre v. Burgunder (Pa. Com. Pl.) 7 Kulp, 63. Display of fireworks in street in a dangerous way a nuisance. Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664. Obstructing alley in rear of store not a nuisance. Bagley v. People, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192; Beecher v. People, 38 Mich. 289, 31 Am. Rep. 316. Bay window projecting over sidewalk held a public nuisance. Reimer's Appeal, 100 Pa. 182, 45 Am. Rep. 373. Private bridge across street a public nuisance, though high enough for passage under it. Bybee v. State, 94 Ind. 443, 48 Am. Rep. 175. Turnpike a public highway. Com. v. Wilkinson, 16 Pick. (Mass.) 175, 26 Am. Dec. 654. For criminal liability of corporations, see ante, pp. 76–80. Continuing obstruction erected by others is indictable. State v. Hunter, 27 N. C. 369, 44 Am. Dec. 41.

[21] Municipal corporation indictable for neglect to remove a nuisance which it has power to remove. People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95. And see State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586. As to liability of corporations generally, see ante, pp. 76–80.

[22] 4 Bl. Comm. 167; People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; State v. King, 25 N. C. 411; 2 Whart. Cr. Law, § 1485 et seq.; Hill v. State, 4 Sneed (Tenn.) 443; State v. Inhabitants of Madison, 63 Me. 546.

[23] Seacord v. People, 121 Ill. 623, 13 N. E. 194.

or that it contributes to the wealth and prosperity of the community.[24] "The public health, the welfare and safety of the community, are matters of paramount importance, to which all pursuits, occupations, and employments of individuals inconsistent with their preservation must yield." [25] Nor does mere lapse of time give a right to maintain a nuisance;[26] nor, it seems, the fact that it was first established away from the population and that the population has approached,[27] although on this point there is a conflict of authority.[28] On the other hand, in determining whether a particular business is a nuisance, the character of the surroundings must be considered. The distinction is between justifying an admitted nuisance and showing that the business is not a nuisance to the surrounding population. The character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle, for what would not be a nuisance in a manufacturing city might be such in a small town or village. "People who live in great cities that are sustained by manufacturing enterprises," it was said in a

[24] Anon., 12 Mod. 342; Rex v. Ward, 4 Adol. & E. 384; Respublica v. Caldwell, 1 Dall. (Pa.) 150, 1 L. Ed. 77; State v. Kaster, 35 Iowa, 221.

[25] Com. v. Upton, 6 Gray (Mass.) 473; People v. Cunningham, 1 Denio (N. Y.) 524, at page 536, 43 Am. Dec. 709; Rung v. Shoneberger, 2 Watts (Pa.) 23, 26 Am. Dec. 95; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Pittsburgh & A. Bridge Co. v. Com. (Pa.) 8 Atl. 217; People v. White-Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. See Whart. Cr. Law, §§ 1415, 1437–1440.

[26] See cases cited in preceding note.

[27] See cases cited in note 25.

[28] Rex v. Cross, 2 Car. & P. 483. See Ellis v. State, 7 Blackf. (Ind.) 534.

well-considered case,[29] "must necessarily be subject to many annoyances and positive discomforts, by reason of noise, dirt, smoke, and odors, more or less disagreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants have a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city, and the manner and use of the river front for manufacturing purposes. If, looked at this way, it is a common nuisance, it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve."

Legislative authority may be a justification for doing what would otherwise be a nuisance. The authority must be strictly followed. Public authority is no justification if the condition of things complained of as a nuisance results from negligence in performing what was authorized.[30]

[29] Where defendants were charged with maintaining a public and common nuisance by operating an oil refinery in the city of Allegheny, which emitted noxious vapors, and in which were stored and used inflammable and explosive oils and gases, it being denied that the business was such nuisance, the character and location when the refinery was established, the nature and importance of the business, the length of time which it had been operated, the capital invested, and the influence of the business on the growth and prosperity of the community were proper matters for the consideration of the jury in determining whether it was a public nuisance. Com. v. Miller, 139 Pa. 77, 21 Atl. 138, 23 Am. St. Rep. 170.

[30] See Whart. Cr. Law, § 1424.

BIGAMY OR POLYGAMY.

116. Bigamy or polygamy is a statutory, and not a common-law, crime. It is committed where one, being legally married, marries another person during the life of his or her wife or husband.

117. EXCEPTIONS—The statutes generally except from their operation

(a) A person whose husband or wife has been absent for a certain number of years without being known by such person to be living within that time; and

(b) A person whose first marriage has been declared void, annulled, or dissolved by the judgment of a court of competent jurisdiction.

In England, prior to the passage of the statute of James I, in 1604,[1] bigamy or polygamy was punished in the ecclesiastical courts only. By that statute it was made a crime punishable in the civil courts. With us all of the states have statutes defining and punishing this crime, and, while they may differ slightly, they are substantially covered by the definition given above. Some of the statutes call the crime "polygamy," while others, substantially the same, call it "bigamy."

It is the second marriage that constitutes the crime, and it need not be proved that there was marital cohabitation and intercourse.[2] On a prosecution for bigamy, it is no defense that the second marriage was defective or voidable, or even that it was void, as, for instance, because of consanguinity; for, because of the first marriage, the second marriage is always necessarily void. It is the going through the ceremony of the second marriage that is punished.[3] It

§§ 116–117. [1] 1 Jac. I, c. 2.

[2] Nelms v. State, 84 Ga. 466, 10 S. E. 1087, 20 Am. St. Rep. 377; U. S. v. Cannon, 4 Utah, 122, 7 Pac. 369.

[3] 2 Whart. Cr. Law, § 1689; People v. Brown, 34 Mich. 339, 22

is a good defense that the first marriage was absolutely void, for in such case there was no husband or wife living when the second marriage was contracted; but the fact that the first marriage was voidable is no defense, so long as it had not been actually avoided.[4] The statutes of some of the states expressly make the other party to the bigamous marriage criminally liable if he or she knew of the first marriage, and, even in the absence of such a statute, he or she might be liable as a principal in the second degree, though it is doubtful.[5]

Am. Rep. 531; Reg. v. Brown, 1 Car. & K. 144; Reg. v. Allen, L. R. 1 Cr. Cas. 367; Carmichael v. State, 12 Ohio St. 553; Hayes v. People, 25 N. Y. 390, 82 Am. Dec. 364. A marriage by consent followed by "mutual assumption of marital rights, duties, or obligations" under Civ. Code, § 55, is sufficient basis for prosecution for bigamy. People v. Beevers, 99 Cal. 286, 33 Pac. 844. Where a person contracts a common-law marriage, lacking the formalities prescribed by statute for solemnization of marriages, it is bigamy. People v. Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. Rep. 408.

[4] Shafher v. State, 20 Ohio, 1; State v. Barefoot, 2 Rich. Law (S. C.) 209; People v. McQuaid, 85 Mich. 123, 48 N. W. 161. On prosecution for bigamous third marriage, where it appears that defendant had married his second wife during his first wife's life, but was divorced from the first wife before the alleged bigamous marriage, he cannot be convicted, since, at the time of the last marriage, he is not legally married to another. Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; State v. Goodrich, 14 W. Va. 834. See, also, People v. Corbett, 49 App. Div. 514, 63 N. Y. Supp. 460; Keneval v. State (Tenn. Sup.) 64 S. W. 897. Belief that the first marriage was void is no defense, being a mistake of law. Medrano v. State, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775; State v. Sherwood, 68 Vt. 414, 35 Atl. 352. Nor is it any defense that the other party to the first marriage was under the age of consent, where there was no separation by consent before she reached the age of consent, or refusal to consent on arriving at that age. People v. Slack, 15 Mich. 193. See, also, People v. Beevers, 99 Cal. 286, 33 Pac. 844.

[5] 2 Whart. Cr. Law, §§ 1687, 1688.

By the terms of most, if not all, the statutes, a person who has been legally divorced a vinculo matrimonii does not commit bigamy by marrying again; but it is otherwise where the decree, as it may in some states, prohibits a second marriage,[6] or where the divorce is only a mensa et thoro, or where the decree has been fraudulently obtained by going into another state.[7] Where there has been no valid divorce from the first marriage, an honest belief to the contrary, even with advice of counsel, is no defense.[8]

Under the statutes, a person whose husband or wife has been absent for a certain number of years, specified in the statute, without being known by such person to be living within that time, does not commit bigamy by marrying again, as it may be presumed that the absent spouse is dead; but until the expiration of this time a person marries at his peril. Whether an honest, but erroneous, belief that the absent spouse was dead, is a defense, is a question concerning which, as we have seen,[9] there is some conflict of au-

[6] People v. Faber, 92 N. Y. 146, 44 Am. Rep. 357; Baker v. People, 2 Hill (N. Y.) 325; Com. v. Putnam. 1 Pick. (Mass.) 136; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[7] Thompson v. State, 28 Ala. 12; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

[8] State v. Goodenow, 65 Me. 30; Davis v. Com., 13 Bush (Ky.) 318; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Hughes, 58 Iowa, 165, 11 N. W. 706; State v. Armington, 25 Minn. 29; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800 (belief that marriage had been annulled by agreement); Russell v. State, 66 Ark. 185, 49 S. W. 821, 74 Am. St. Rep. 78; People v. Hartman, 130 Cal. 487, 62 Pac. 823. The contrary has been held in Indiana, where such belief was on reasonable grounds, after due care and inquiry. Squire v. State, 46 Ind. 459. See, also, Reg. v. Tolson, 23 Q. B. Div. 168.

[9] Ante, p. 88.

thority.[10] It is no defense that the religious belief of one who has committed bigamy required him to do so, as in case of Mormonism, and that the marriage ceremony was performed in good faith, and from a sense of religious duty, according to the rites of his church.[11]

ADULTERY.

118. Some courts have recognized adultery as a common-law misdemeanor. Others hold that it is not a crime unless made so by statute.

119. The definitions of the crime vary.

(a) In some states it is voluntary sexual intercourse between persons one of whom is lawfully married to another, both parties being guilty.

(b) In other states it is such intercourse by a married person with one who is not his or her wife or husband, the married person only being guilty.

(c) In other states it is such intercourse with a married woman by one not her husband, both parties being guilty.

Under the old Roman law, it was essential to the crime of adultery that the woman should be married to another, and the crime was not committed where a married man had sexual intercourse with a single woman, the gist of the offense being in the danger of putting spurious offspring upon a man. Both parties were guilty. Under the English ecclesiastical law, it makes no difference which party is married, whether the man or the woman; and, if one is married, both are guilty.[1] In many of the states the statutes particularly define this crime, so as to leave no room for

[10] No defense, Com. v. Mash, 7 Metc. (Mass.) 472; Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2. Contra, Reg. v. Tolson, 23 Q. B. Div. 168.

[11] Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244.

§§ 118–119. [1] 2 Whart. Cr. Law, §§ 1718, 1719; Bish. St. Crimes, § 659.

doubt or construction; while in others they merely declare that "adultery" shall be punished, thus leaving the definition of adultery to the courts, and the courts have differed in their defining. Thus, some have followed the definition of the English ecclesiastical law, and hold that the crime is committed by both parties where either is married to a third person.[2] Others, on the contrary, follow the old Roman law, and hold that the woman must be married, in which case both parties are guilty; and that the crime is not committed by either party where a married man has intercourse with a single woman.[3] In some states this definition is declared by statute.[4] In other states the crime is defined, either by statute or by the courts, as voluntary sexual intercourse by a married person with a person who is not his or her wife or husband, the participant in the act, if single, not being guilty.[5]

[2] State v. Hinton, 6 Ala. 864; State v. Wilson, 22 Iowa, 364; State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59 (by statute). In Texas there must be either a "living together" and having carnal intercourse, or "habitual" intercourse without living together. Mere proof of carnal intercourse without living together is not enough. Mitten v. State, 24 Tex. App. 346, 6 S. W. 196. So, also, in South Carolina, State v. Carroll, 30 S. C. 85, 8 S. E. 433, 14 Am. St. Rep. 883; and in Illinois, Miner v. People, 58 Ill. 59. See post, p. 362.

[3] State v. Lash, 16 N. J. Law, 380, 32 Am. Dec. 397; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Wallace, 9 N. H. 515; State v. Pearce, 2 Blackf. (Ind.) 318; State v. Armstrong, 4 Minn. 335 (Gil. 251); Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; State v. Weatherby, 43 Me. 261, 69 Am. Dec. 59. But in Maine it is changed by statute in accord with preceding note. Id.

[4] Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Com. v. Reardon, 6 Cush. (Mass.) 79.

[5] Com. v. Lafferty, 6 Grat. (Va.) 672; Miner v. State, 58 Ill. 59; Cook v. State, 11 Ga. 54, 56 Am. Dec. 410; Helfrich v. Com., 33 Pa. 68, 75 Am. Dec. 579; Smith v. Com., 54 Pa. 209, 93 Am. Dec. 686; Hunter v. U. S., 1 Pin. (Wis.) 91, 39 Am. Dec. 277.

Adultery is not a common-law crime in England, but is regarded as a crime against the ecclesiastical law only, and is therefore punished exclusively in the ecclesiastical courts. With us some of the courts have recognized this portion of the ecclesiastical law as part of our common law, and regard adultery as a common-law crime.[6] Other courts have taken the contrary view, and hold that, if adultery is not made a crime by statute, it cannot be punished at all as a distinctive crime, unless it amounts to open and notorious illicit cohabitation.[7] In some of these states it has been made a statutory crime. To constitute the crime, one of the parties at least must be lawfully married to another; and, on a prosecution for the crime, the marriage must be proved.[8] Unlawful sexual intercourse by a divorced person is not adultery, if the status of the other party does not make it so, provided, of course, the divorce is valid; and this question is to be determined by the law of the forum.[9]

[6] State v. Avery, 7 Conn. 267, 18 Am. Dec. 105; State v. Cox, 4 N. C. 597.

[7] State v. Cooper, 16 Vt. 551; State v. Lash, 16 N. J. Law, 380, 32 Am. Dec. 397; State v. Brunson, 2 Bailey (S. C.) 149; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Com. v. Isaacs, Id. 634; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Ex parte Thomas, 103 Cal. 497, 37 Pac. 514.

[8] State v. Armstrong, 4 Minn. 335 (Gil. 251); State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Miner v. State, 58 Ill. 59; Webb v. State, 24 Tex. App. 164, 5 S. W. 651; Banks v. State, 96 Ala. 78, 11 South. 404. The single state, being the natural state, will be presumed until a marriage is proved. Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600. When marriage is proved, the continuance of the married state will be presumed until the contrary appears. People v. Stokes, 71 Cal. 263, 12 Pac. 71. If the accused was married to woman under legal age, it must be shown that she acquiesced in the marriage on arriving at the age of consent and before the offense. People v. Bennett, 39 Mich. 208.

[9] State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59.

It is otherwise if the divorce is invalid, and honest belief in its validity, even on advice of counsel, is no defense.[10] It has been held that if a man from whom his wife has obtained a divorce for his fault, or a woman from whom her husband is so divorced, marries again, in violation of a statute prohibiting marriage under such circumstances, he or she does not commit adultery, if the other party to the marriage is single, by cohabiting with her or him; for the reason that, to constitute adultery, one of the parties must be married.[11] The contrary has been held in prosecutions for bigamy.[12] It is never a defense that the accused, because of his religious views, did not believe in the marriage vow, or that the act was in accord with local customs, or, in case of a foreigner, with foreign customs, as in case of adulterous intercourse under the free-love system in some localities, or in case of adultery by foreigners who, when at home, are not required to regard the sanctity of the marriage vows.[13] It seems that honest belief in the death of the party's spouse is a good defense in case of absence for a length of time, and under circumstances warranting an inference of death, but not otherwise.[14] Where a formal marriage is duly celebrated, but one of the parties has a husband or wife living at the time, the marriage, of course, is unlawful; but the other party, if

[10] 2 Whart. Cr. Law, § 1726; State v. Whitcomb, 52 Iowa, 85, 2 N. W. 970, 35 Am. Rep. 258; Fox v. State, 3 Tex. App. 329, 30 Am. Rep. 144; Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. Rep. 294; State v. Goodenow, 65 Me. 30; Com. v. Mash, 7 Metc. (Mass.) 472.

[11] State v. Weatherby, 43 Me. 258, 69 Am. Dec. 59.

[12] Ante, p. 353.

[13] Bankus v. State, 4 Ind. 114.

[14] Com. v. Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653. It is no defense where the other party to the interconrse was the deserting spouse, since in such case the presumption of death does not arise. Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

ignorant of the facts, and acting in good faith, commits no wrong, if the cohabitation is not continued after acquiring such knowledge, and is not guilty of adultery.[15] It would probably be otherwise if no marriage were celebrated, particularly if fornication were a crime in the particular jurisdiction; as the principle that, in order that ignorance of fact may exempt one from punishment, the original intention must not have been wrongful, would apply.[16] If force is used in accomplishing the intercourse, it is of course a defense to the party ravished, for the intercourse must be voluntary; but it is not a defense to the ravisher.[17] Emission need not be proved.[18] In some states it is expressly provided that no prosecution for adultery can be commenced except on complaint of the husband or wife of the accused. If he or she does not object in these states, no one else can.[19]

[15] Vaughan v. State, 83 Ala. 55, 3 South. 530; Banks v. State, 96 Ala. 78, 11 South. 404.

[16] Ante, pp. 82, 87, 88; Bish. St. Crimes, § 665; Owens v. State, 94 Ala. 97, 10 South. 669; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

[17] State v. Summers, 98 N. C. 702, 4 S. E. 120; State v. Sanders, 30 Iowa, 582. Under such circumstances, if rape is proved, and adultery is a misdemeanor only, it would at common law merge, and the rape only could be punished. See ante, p. 43.

[18] Com. v. Hussey, 157 Mass. 415, 32 N. E. 362.

[19] State v. Stout, 71 Iowa, 343, 32 N. W. 372; State v. Brecht, 41 Minn. 50, 42 N. W. 602; People v. Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438. This does not make complainant a party in the case. The people and the defendant are the only parties. Parsons v. People, 21 Mich. 509. Complaint for adultery between married woman and unmarried man is properly made by the woman's husband. Bayliss v. People, 46 Mich. 221, 9 N. W. 257; People v. Davis, 52 Mich. 569, 18 N. W. 362. Prosecution will be dismissed where only person competent to make complaint asks leave to withdraw it. People v. Dalrymple, 55 Mich. 519, 22 N. W. 20.

FORNICATION.

120. Fornication is voluntary unlawful sexual intercourse, under circumstances not constituting adultery.

121. A single act of fornication is not a crime at common law, but is made so in some states by statute.

Fornication is not punishable at common law, unless it amounts to public lewdness or notorious illicit cohabitation,[1] though some doubt has been expressed as to this statement.[2] A single act of fornication has, however, been made a crime by statute in many of the states. The definition will vary in the different states, as in case of adultery. What is adultery in one state may be fornication in another. Voluntary sexual intercourse between two unmarried persons is fornication;[3] but the crime may also be committed where the intercourse is between a married man and an unmarried woman, both being guilty of fornication in some states, while in others the man is guilty of adultery and the woman of fornication, and in others, again, both may be guilty of adultery. So, also, where the intercourse is between a single man and a married woman, both may be guilty of adultery, or the man may be guilty of fornication only, according to the law of the particular state. The statutes and decisions of the particular state must be consulted.

§§ 120–121. [1] Bish. St. Crimes, § 691; State v. Cooper, 16 Vt. 551; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Com. v. Isaacs, 5 Rand. (Va.) 634; Com. v. Jones, 2 Grat. (Va.) 555; Brooks v. State, 2 Yerg. (Tenn.) 482.

[2] 2 Whart. Cr. Law, § 1741; State v. Cox, 4 N. C. 597.

[3] Territory v. Jaspar, 7 Mont. 1, 14 Pac. 647. That a person is unmarried will be presumed until the contrary appears. Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600. In some states fornication is only committed where there is a living together and having carnal intercourse, or habitual carnal intercourse without living together. Jones v. State, 29 Tex. App. 347, 16 S. W. 189. See post, p. 362

LEWDNESS AND ILLICIT COHABITATION.

122. For a man and woman to illicitly cohabit together, openly and notoriously, or for a person to be guilty of any open and notorious lewdness and indecency, is a crime at common law, as it constitutes a public scandal and nuisance.

While the common law does not punish acts of adultery or fornication committed privately, it is otherwise where they are committed openly, for they then become a public scandal, and shock and corrupt the morals of the whole community. Therefore any open and notorious lewdness, or illicit cohabitation, is a common-law crime. In almost all, if not in all, of the states, there are statutes covering this subject. They are directed against "lewd and lascivious cohabitation," "illicit cohabitation," "living in" adultery or fornication, or "prostitution." To constitute a "living" together or "cohabitation," there must be more than a single act, or even occasional acts, of intercourse.[1] There must

§ 122. [1] McLeland v. State, 25 Ga. 477; Smith v. State, 39 Ala. 554; State v. Crowner, 56 Mo. 147; State v. Osborne, 39 Mo. App. 372; People v. Gates, 46 Cal. 52; Richardson v. State, 37 Tex. 346; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Luster v. State, 23 Fla. 339, 2 South. 690; Pinson v. State, 28 Fla. 735, 9 South. 706; Pruner v. Com., 82 Va. 115; Brown v. State (Miss.) 8 South. 257. An abiding together in the same house or joint residing place must be shown. Bird v. State, 27 Tex. App. 635, 11 S. W. 641, 11 Am. St. Rep. 214. An instruction that occasional acts of adultery do not make out the offense; but if there was adulterous intercourse, and such a condition of the minds of the parties that, when opportunity offered, the act would be repeated, defendant was guilty, and that this condition makes a "living in adultery,"—was held proper. Bodifield v. State, 86 Ala. 67, 5 South. 559, 11 Am. St. Rep. 20. They must dwell openly together. Thomas v. State, 39 Fla. 437, 22 South. 725; Penton v. State (Fla.) 28 South. 774.

be a living together, though it is said that it may be for a single day only.[2] The offense is committed by a man who, at stated periods, goes openly to spend the night with a woman, not his wife, though during other nights he lives at home with his wife. He need not take up his abode with the strange woman.[3]

INCEST.

123. It is doubtful whether incest is a crime at common law, but it is generally declared so by statute. It may be defined as illicit sexual intercourse between persons who are related within the degrees of consanguinity or affinity wherein marriage is prohibited by law.[1]

This crime is committed whenever sexual intercourse is had by a man and woman who are so nearly related that the law prohibits them from marrying, as in case of father and daughter, or brother and sister. Of course, they must

[2] Hall v. State, 53 Ala. 463.

[3] Collins v. State, 14 Ala. 608. Mormonism, U. S. v. Snow, 4 Utah, 280, 9 Pac. 501.

§ 123. [1] Bish. St. Crimes, §§ 727, 728; Daniels v. People, 6 Mich. 381; State v. Herges, 55 Minn. 464, 57 N. W. 205; Nations v. State, 64 Ark. 467, 43 S. W. 396. Between stepfather and stepdaughter, prior death of mother a defense. Johnson v. State, 20 Tex. App. 609, 54 Am. Rep. 535. Incest does not depend on the legitimacy of the parties, People v. Jenness, 5 Mich. 305; Baker v. State, 30 Ala. 521; People v. Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344; Clark v. State, 39 Tex. Cr. R. 179, 45 S. W. 576, 73 Am. St. Rep. 918; Brown v. State (Fla.) 27 South. 869; nor upon whether they are relatives of the whole or of the half blood, People v. Jenness, 5 Mich. 305; Shelly v. State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926. Half-brother is a brother within meaning of statute. State v. Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753. Half-brother of person's father is an "uncle." State v. Reedy, 44 Kan. 190, 24 Pac. 66. Half-niece, State v. Gniton, 51 La. Ann. 155, 24 South. 784. Stepdaughter, Taylor v. State, 110 Ga. 150, 35 S. E. 161. What is "affinity." Chinn v. State, 47 Ohio St. 575, 26 N. E. 986, 11 L. R. A. 630.

know of their relationship, or be charged by law with such knowledge. If a brother and sister were to separate when children, and afterwards meet, and innocently marry, as has sometimes happened, they would not be guilty.[2] A marriage between the parties accused of incest is no defense if it was absolutely void, but it is otherwise where the marriage was merely voidable, and had never been annulled.[3] Consent of the female is no defense.[4] The crime can only be committed by mutual consent of the parties. If the intercourse is accomplished by force, it is punishable as rape only.[5] One act of intercourse is enough to constitute the crime.[6] The reputation or character of the woman as chaste or unchaste is immaterial.[7]

[2] 1 Hume, Comm. 448; State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321. But see State v. Wyman, 59 Vt. 527, 8 Atl. 900; State v. Dana, 59 Vt. 623, 10 Atl. 727. If one of the parties knows of the relationship, he or she is guilty. State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321. In some states knowledge is required by statute. Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691.

[3] Bish. St. Crimes, § 727; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Attorney General v. Broaddus, 6 Munf. (Va.) 116; Baker v. State, 30 Ala. 521.

[4] Schoenfeldt v. State, 30 Tex. App. 695, 18 S. W. 640.

[5] People v. Harriden, 1 Parker, Cr. R. (N. Y.) 344; De Groat v. People, 39 Mich. 124; State v. Jarvis, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep. 141; People v. Skutt, 96 Mich. 449, 56 N. W. 11; People v. Burwell, 106 Mich. 27, 63 N. W. 986; State v. Eding, 141 Mo. 281, 42 S. W. 935. Contra, State v. Chambers, 87 Iowa, 1, 53 N. W. 1090, 43 Am. St. Rep. 349; Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954; Smith v. State, 108 Ala. 1, 19 South. 306, 54 Am. St. Rep. 140; State v. Nugent, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133. If the female is under the age of consent, the crime is not incest. De Groat v. People, 39 Mich. 124.

[6] State v. Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790; Mathis v. Com. (Ky.) 13 S. W. 360.

[7] Mathis v. Com. (Ky.) 13 S. W. 360; People v. Benoit, 97 Cal. 249, 31 Pac. 1128.

MISCEGENATION.

124. Miscegenation, or intermarriage between the white and negro races, or the living together of such persons in adultery or fornication, is a statutory crime in some of the states.

A mulatto is a negro, within the meaning of these statutes.[1] On a prosecution for miscegenation, the female's character and reputation for chastity is immaterial, and cannot be attacked.[2] Ignorance of the law is no defense.[3] Proof that the parties lived together for a single day in adultery or fornication is sufficient; it is not necessary to show any agreement or understanding between them that sexual intercourse should be continued.[4] It has been held that these statutes are constitutional.[5]

SODOMY, BESTIALITY, AND BUGGERY.

125. Sodomy is carnal copulation against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with a beast.[1]

126. Bestiality is carnal copulation by a man or woman with a beast.

127. Buggery is sodomy.

§ 124. [1] Linton v. State, 88 Ala. 216, 7 South. 261. Contra, where there is less than one-fourth negro blood. McPherson v. Com., 28 Grat. (Va.) 939.

[2] Linton v. State, 88 Ala. 216, 7 South. 261.

[3] Hoover v. State, 59 Ala. 57.

[4] Linton v. State, 88 Ala. 216, 7 South. 261.

[5] 2 Whart. Cr. Law, § 1754; State v. Gibson, 36 Ind. 404, 10 Am. Rep. 42; Pace v. State, 69 Ala. 231, 44 Am. Rep. 513, affirmed in 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207.

§§ 125–127. [1] Russ. Crimes, 937; 3 Inst. 58, 59; 1 Hawk. P. C. c. 4; 1 Hale, P. C. 669; 4 Bl. Comm. 215.

These three terms are generally used synonymously, but it is not entirely clear that they can be correctly so used. There is some doubt whether the crime committed by man or woman with a beast is sodomy, as the term was originally understood,[2] but it is probably now so regarded. If so, then sodomy includes bestiality. Sodomy, however, is not synonymous with bestiality. The latter term applies only to copulation with a beast, and would not include unnatural copulation by man with man or woman. Buggery includes both sodomy and bestiality. The crimes are generally spoken of as the "abominable and detestable crime against nature." In Texas it was held that a statute punishing the crime against nature was not sufficiently definite to refer specifically to sodomy,[3] but this was probably because of a statute in that state providing that no person shall be punished for any crime unless the same shall be "expressly defined" in the statute punishing the same. In Louisiana a statute punishing the "abominable and detestable crime against nature committed with mankind or beast" was held sufficient, the court stating: "The books satisfy us that the crime referred to by the statute is known in the common law by the convertible and equivalent names of 'crime against nature,' 'sodomy,' and 'buggery.'" [4] Sodomy is named from the prevalence of the sin in the city of Sodom, which the Bible tells us was destroyed by fire because of its wickedness. A fowl is not regarded as a beast, within the meaning of

[2] Code Ga. §§ 4352, 4354; Ausman v. Veal, 10 Ind. 355, 71 Am. Dec. 331.

[3] Fennell v. State, 32 Tex. 378.

[4] State v. Williams, 34 La. Ann. 87; Honselman v. People, 168 Ill. 172, 48 N. E. 304. Woman included under "mankind." Lewis v. State, 36 Tex. Cr. R. 37, 35 S. W. 372, 61 Am. St. Rep. 831. See, also, Com. v. Snow, 111 Mass. 411; Com. v. Dill, 160 Mass. 536, 36 N. E. 472; State v. Romans, 21 Wash. 284, 57 Pac. 819.

these definitions,[5] though this has in some jurisdictions been changed by statutes substituting the word "animal."[6] Both penetration and emission are necessary at common law,[7] but in some jurisdictions there are statutes declaring proof of emission unnecessary.[8] The act in a person's mouth is not enough.[9] It must be per anum. Both parties are guilty, and consent is therefore no defense.[10] These crimes were felonies under the old English common law.[11] Mr. Bishop states that it is doubtful whether under the common law with us it is a felony or a misdemeanor, but it is probably a felony.[12]

[5] Rex v. Mulreaty, cited in 1 Russ. Crimes, 938.

[6] Reg. v. Brown, 16 Cox, Cr. Cas. 715.

[7] See 2 Bish. New Cr. Law, § 1127 et seq.; People v. Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321; State v. Gray, 53 N. C. 170; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536. Contra, Com. v. Thomas, 1 Va. Cas. 307; Pennsylvania v. Sullivan, Add. (Pa.) 143. May be inferred from circumstances, People v. Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321.

[8] Rex v. Reekspear, 1 Moody, Cr. Cas. 342; and see cases in preceding note; State v. Vicknair, 52 La. Ann. 1921, 28 South. 273.

[9] Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360. 37 Am. St. Rep. 833; Rex v. Jacobs, Russ. & R. 331; People v. Boyle, 116 Cal. 658, 48 Pac. 800.

[10] 2 Bish. Cr. Law, § 1193; 1 East, P. C. 480; Reg. v. Jellyman, 8 Car. & P. 604; Reg. v. Allen, 1 Denison, Cr. Cas. 364.

[11] 4 Bl. Comm. 215.

[12] 1 Bish. New Cr. Law, §§ 503 (1), 1196. See State v. La Forrest, 71 Vt. 311, 45 Atl. 225.

SEDUCTION.

128. Seduction is probably not a crime at common law,[1] but it is made so by statute in most of the states. It may be defined generally as the act of a man in enticing a woman of previous chaste character, by means of persuasion and promises, to have sexual intercourse with him.

It is very doubtful whether there was any such offense as seduction at common law, but it was declared a crime by a very early English statute, and has been very generally declared a crime in this country. The statutes of the different states defining and declaring the crime of seduction differ somewhat. Some of them make it a crime to "seduce and debauch" an unmarried female of previous chaste character, saying nothing at all as to the means to be employed. Others make it a crime for any unmarried man, by promise of marriage, or for any married man, to seduce such a female.

Condition and Character of Female.

Under these statutes, it is necessary to show that the female was unmarried.[2] It is also essential that the woman shall have been of previous chaste character when seduced.[3] The courts differ as to what is meant by previous chaste character. Some courts say that it means actual personal virtue, and not reputation, and that it is therefore only competent to show specific acts of lewdness on the part of the

§ 128. [1] Bish. St. Crimes, § 625.

[2] State v. Wheeler, 108 Mo. 658, 18 S. W. 924; People v. Krusick, 93 Cal. 74, 28 Pac. 794.

[3] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Munkers v. State, 87 Ala. 94, 6 South. 357; State v. Primm, 98 Mo. 368, 11 S. W. 732; Smith v. Milburn, 17 Iowa, 35. And see cases in following notes.

woman.[4] It is further said that the statute is for the protection of the pure in mind and innocent in heart, who may be led astray; and that, therefore, a woman of lewd conversation and manners, and who is guilty of lascivious acts and indecent familiarity with men, is not protected, though she may never have been guilty of sexual intercourse.[5] A statute using the words "virtuous unmarried female" was held to apply to a woman who has never had sexual intercourse, and not to one who has.[6] In some of the states it is held that the law presumes that a woman was chaste until the contrary appears, and that the burden of proving want of chastity is on the accused.[7] Other courts hold that, while chastity is generally presumed, the innocence of the accused is also presumed, and require the state to show affirmatively that the female was chaste.[8] In some states the statute is

[4] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; Lyons v. State, 52 Ind. 427. See, also, ante, p. 253, note 17.

[5] Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708. And see Wood v. State, 48 Ga. 192, 15 Am. Rep. 664. The fact that the girl allowed men to hug and kiss her was held not to indicate such a want of chastity as to overcome a verdict of guilty of seduction against the man. State v. McIntire, 89 Iowa, 139, 56 N. W. 419.

[6] O'Neill v. State, 85 Ga. 383, 11 S. E. 856; People v. Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

[7] Wood v. State, 48 Ga. 192, 15 Am. Rep. 644; McTyier v. State, 91 Ga. 254, 18 S. E. 140; People v. Brewer, 27 Mich. 134; People v. Squires, 49 Mich. 487, 13 N. W. 828; Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; State v. Hemm, 82 Iowa, 609, 48 N. W. 971; McTyier v. State, 91 Ga. 254, 18 S. E. 140; Mills v. Com., 93 Va. 815, 22 S. E. 863.

[8] Zabriskie v. State, 43 N. J. Law, 640, 39 Am. Rep. 610; Oliver v. Com., 101 Pa. 215, 47 Am. Rep. 704; State v. Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; State v. Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; People v. Wallace, 109 Cal. 611, 42 Pac. 159.

silent as to the character of the woman, but it is held that the legislature intended to protect chaste women only, and that the state must prove chaste character.[9] The fact that a woman has been unchaste does not deprive her of the protection of the statute, if she has reformed and is chaste when seduced.[10]

The Seduction.

The statute in some states requires that the seduction shall be under promise of marriage. In others it says nothing about the character of the promises, but merely punishes a man who seduces and debauches an unmarried female of previous chaste character. To seduce, however, implies the use of promises and persuasions. Where the statute does not so require, the promise need not necessarily be of marriage. Any other subtle device or deceptive means in accomplishing the intercourse is sufficient.[11] There must in all cases be some sufficient promise or inducement, and the woman must yield because of the promises. If she consents merely from carnal lust, and the intercourse is from mutual desire, there is no seduction.[12] A promise of compensation merely is not enough.[13] In some states a promise of mar-

[9] Polk v. State, 40 Ark. 482, 48 Am. Rep. 17.

[10] State v. Carron, 18 Iowa, 372, 87 Am. Dec. 401; State v. Moore, 78 Iowa, 494, 43 N. W. 273; State v. Timmens, 4 Minn. 325 (Gil. 241); People v. Squires, 49 Mich. 487, 13 N. W. 828; People v. Clark, 33 Mich. 112; People v. Gibbs, 70 Mich. 425, 38 N. W. 257; Suther v. State, 118 Ala. 88, 24 South. 43.

[11] People v. Gibbs, 70 Mich. 425, 38 N. W. 257; Anderson v. State, 104 Ala. 83, 16 South. 108; Bracken v. State, 111 Ala. 68, 20 South. 636, 56 Am. St. Rep. 23. Coaxing language enough. State v. Hayes, 105 Iowa, 82, 74 N. W. 757.

[12] People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; State v. Primm, 98 Mo. 368, 11 S. W. 732.

[13] People v. Clark, 33 Mich. 112.

riage alone is enough,[14] while in others some additional persuasion is necessary.[15] A promise of marriage, however, even in those states where such a promise alone is sufficient, if made and understood as a mere matter of form, is not enough.[16] The promise of marriage need not be valid and binding, provided the woman believed in it and consented in reliance on it;[17] but manifestly a promise by a man whom the woman knows to be already married is not such persuasion as will make him guilty of seduction.[18] If a chaste woman is undone under a promise of marriage, it will be no defense for the man to show that he made the promise in good faith.[19] For a man to represent to a girl that there is nothing wrong in the act, and that no one will find out, is to use artifice or fraud, and amounts to seduction.[20]

[14] Phillips v. State, 108 Ind. 406, 9 N. E. 345; State v. Abrisch, 41 Minn. 41, 42 N. W. 543.

[15] Putnam v. State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738; O'Neill v. State, 85 Ga. 383, 11 S. E. 856. What constitutes, Jones v. State, 90 Ga. 616, 16 S. E. 380; McTyier v. State, 91 Ga. 254, 18 S. E. 140.

[16] People v. Clark, 33 Mich. 112. To promise to marry if she becomes pregnant is not to "seduce under promise of marriage." State v. Adams, 25 Or. 172, 35 Pac. 36, 22 L. R. A. 840, 42 Am. St. Rep. 790. Contra, State v. Hughes, 106 Iowa, 125, 76 N. W. 520, 68 Am. St. Rep. 288; People v. Van Alstyne, 144 N. Y. 361, 39 N. E. 343. Promise to marry when old enough sufficient. People v. Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

[17] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211.

[18] Wood v. State, 48 Ga. 192, 15 Am. Rep. 664.

[19] People v. Samonset, 97 Cal. 448, 32 Pac. 520; State v. Bierce, 27 Conn. 319; State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

[20] State v. Hemm, 82 Iowa, 609, 48 N. W. 971.

Rape or Seduction.

Seduction is distinguished from rape by the fact that no force is used to accomplish the purpose. The woman is persuaded to consent in seduction, while the act is by force and against her will in rape. Consent therefore is no defense on a prosecution for seduction, as it is in case of rape.[21] If the woman does not consent, and force is used, the crime is rape, and there can be no conviction as for seduction;[22] but if consent was in fact obtained, the fact that force was also used is immaterial, as there cannot be rape with consent.[23]

Marriage of the Parties.

Under most of the statutes the marriage of the parties after the seduction is declared a defense.[24] In the absence of such a provision, it would be otherwise.[25] Mere promise of marriage after the seduction is not enough,[26] and in some, if not in all, states, an offer by the man to marry the woman does not relieve him from liability.[27] If the marriage takes place, the good or bad faith of the man in going through

[21] State v. Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

[22] People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; State v. Lewis, 48 Iowa, 578, 30 Am. Rep. 407; State v. Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613; Croghan v. State, 22 Wis. 444.

[23] Jones v. State, 90 Ga. 616, 16 S. E. 380; People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863. Ante, p. 216.

[24] State v. Otis, 135 Ind. 267, 34 N. E. 954, 21 L. R. A. 733; People v. Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493; Wright v. State, 31 Tex. Cr. R. 354, 20 S. W. 756, 37 Am. St. Rep. 822; Com. v. Wright (Ky.) 27 S. W. 815.

[25] Ante, p. 9.

[26] State v. Mackey, 82 Iowa, 393, 48 N. W. 918.

[27] State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

the ceremony is immaterial. He escapes punishment, even if he marries solely for that purpose.[28]

ABORTION.

129. To procure an abortion is to cause or procure the miscarriage or premature delivery of a woman.

130. To procure an abortion, though with the mother's consent, after the child has quickened, is a misdemeanor at common law, but it is doubtful whether it is a crime before the child has quickened.

131. There are statutes in most of the states making it a felony to procure an abortion, whether the child has quickened or not.

Without a doubt, the destruction of an unborn infant after it has quickened in the womb is a misdemeanor at common law.[1] Wharton states that at an early period it seems to have been deemed a homicide, though, as we have seen, this is no longer the case.[2] In Pennsylvania it was held a crime at common law to procure an abortion before the child had quickened. The court said in that case: "It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated."[3] Other courts have held the contrary.[4] In al-

[28] See cases cited in note 24.

§§ 129–131. [1] 1 Whart. Cr. Law, § 592; Mills v. Com., 13 Pa. 631; Com. v. Bangs, 9 Mass. 387.

[2] Ante, p. 153.

[3] Mills v. Com., 13 Pa. 631; Com. v. Denman, 6 Pa. Law J. 29; State v. Slagle, 82 N. C. 653.

[4] Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; Com. v. Bangs, 9 Mass. 387; State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248; Abrams v. Foshee, 3 Clarke (Iowa) 274, 66 Am. Dec. 77;

most all, if not in all, of the states, statutes have been passed defining and punishing abortion; and some of them do not require that the child shall have quickened.[5] Many of the statutes call the crime "manslaughter" in derogation of the common law.[6] There are also statutes in some of the states making it a crime to have possession of, or to sell or give away, instruments or drugs used for the purpose of committing abortions,[7] and statutes declaring it to be abortion to advise a woman to take medicine to procure a miscarriage.[8] The consent of the mother is no defense.[9] Indeed, a woman is guilty of the crime if she commits the abortion on herself. She is not, however, regarded strictly as an accomplice of a person who procures her miscar-

Mitchell v. Com., 78 Ky. 204, 39 Am. Rep. 227; Smith v. State, 33 Me. 48, 54 Am. Dec. 607.

[5] People v. Stockham, 1 Parker, Cr. R. (N. Y.) 424; Com. v. Wood, 11 Gray (Mass.) 86; State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; People v. Olmstead, 30 Mich. 431; Slattery v. People, 76 Ill. 217; Scott v. People, 141 Ill. 195, 30 N. E. 329; Lamb v. State, 67 Md. 524, 10 Atl. 208; Navarro v. State, 24 Tex. App. 378, 6 S. W. 542; Hatchard v. State, 79 Wis. 357, 48 N. W. 380; Holland v. State, 131 Ind. 568, 31 N. E. 359; Williams v. State (Tex. App.) 19 S. W. 897; Com. v. Surles, 165 Mass. 59, 42 N. E. 502. On a prosecution for attempt to commit an abortion by administering a drug, it was held no defense that the drug turned out to be harmless. State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148. In prosecution for act done with intent to procure miscarriage immaterial whether woman was enceinte. Eggart v. State, 40 Fla. 527, 25 South. 144.

[6] A statute making administration of drugs, etc., to a pregnant woman for purpose of procuring abortion manslaughter in second degree held invalid, as manslaughter cannot exist without death of woman or child. State v. Young, 55 Kan. 349, 40 Pac. 659.

[7] State v. Forsythe, 78 Iowa, 595, 43 N. W. 548.

[8] People v. Phelps, 133 N. Y. 267, 30 N. E. 1012.

[9] 1 Whart. Cr. Law, § 594.

riage, but is looked upon rather as the victim.[10] If it is necessary to destroy a child in its mother's womb to save the mother's life, it may be done on the ground of the necessity. This necessity is also recognized by the statutes.[11] As we have already seen, it is either murder or manslaughter if the mother is killed in attempting to procure an abortion;[12] and it is murder if the child is born alive, and dies from wounds received while in the womb, or dies because prematurely born by reason of the drug administered.[13] In some of the states, statutes have been enacted making it a crime to conceal the death of a bastard child.

[10] 1 Whart. Cr. Law, § 593; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471.

[11] Hatchard v. State, 79 Wis. 357, 48 N. W. 380; People v. McGonegal, 62 Hun, 622, 17 N. Y. Supp. 147. Indictment must allege that miscarriage was not necessary to save life. State v. Stevenson, 68 Vt. 529, 35 Atl. 470; State v. Moothart, 109 Iowa, 130, 80 N. W. 301. Presumption that miscarriage is not necessary is sufficient to prove negative averment in absence of evidence. State v. Lee, 69 Conn. 186, 37 Atl. 75. Burden to negative exception on state. State v. Aiken, 109 Iowa, 643, 80 N. W. 1073.

[12] Ante, p. 192, note 18; p. 206, note 12.

[13] Ante, p. 154.

CHAPTER XIII.

OFFENSES AGAINST PUBLIC JUSTICE AND AUTHORITY.

COMMON BARRATRY, MAINTENANCE, AND CHAMPERTY.

132. Common barratry is the offense of frequently exciting and stirring up suits and quarrels either at law or otherwise.[1]

133. Maintenance is the officious intermeddling in a suit that in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it.[2]

134. Champerty is a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.[3]

§§ 132–134. [1] 4 Bl. Comm. 134; 1 Hawk. P. C. 243; Com. v. Davis, 11 Pick. (Mass.) 433.

[2] 4 Bl. Comm. 134; 1 Hawk. P. C. 249.

[3] 4 Bl. Comm. 135; Hawk. P. C. 257. Though this is Blackstone's definition, it has been said that the champertor need not carry on the suit at his own expense; that it may be where an attorney merely agrees to conduct the suit for a contingent compensation. Lathrop v. Bank, 9 Metc. (Mass.) 489. But see, contra, Aultman v.

These three offenses have some features in common, and are all old common-law crimes, because encouragement of strife and litigation is injurious to the public interests. An example of champerty is where an attorney agrees to carry on a suit, and take as compensation a part of what he may recover,[4] or where one purchases and takes an assignment of a chose in action or right to sue in equity,[5] or purchases land or personalty held adversely by another than the vendor at the time of the purchase.[6] A person who is in no way concerned in a suit is as a rule guilty of maintenance if he bears the expense or retains counsel for a party, but it is otherwise if he has an interest, as that of reversioner, or where he is related to the party he assists.[7] A landlord may assist his tenant, or a master his servant, and one may

Waddle, 40 Kan. 195, 19 Pac. 730; Phillips v. Commissioners, 119 Ill. 626, 10 N. E. 230.

[4] Lathrop v. Bank, 9 Metc. (Mass.) 489; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464.

[5] Illinois Land & Loan Co. v. Speyer, 138 Ill. 137, 27 N. E. 931. The purchase must be for the purpose of suing thereon. West v. Kurtz (Com. Pl. N. Y.) 2 N. Y. Supp. 110, 3 N. Y. Supp. 14; Burnham v. Heselton, 84 Me. 578, 24 Atl. 955.

[6] Bentley v. Childers (Ky.) 7 S. W. 628; Combs v. McQuinn (Ky.) 9 S. W. 495; Nelson v. Brush, 22 Fla. 374; Bleidorn v. Mining Co., 89 Tenn. 166, 204, 15 S. W. 737; Smith v. Price (Ky.) 7 S. W. 918. Conveyance under a contract made before land was held adversely is not champertous. Greer v. Wintersmith, 85 Ky. 516, 4 S. W. 232, 7 Am. St. Rep. 613; Thacker v. Belcher (Ky.) 11 S. W. 3. Does not apply in some states. In re Murray's Estate, 13 Pa. Co. Ct. R. 70. Sale of personalty in adverse possession of another is champertous. Erickson v. Lyon, 26 Ill. App. 17; Foy v. Cochran, 88 Ala. 353, 6 South. 685.

[7] Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444; Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572; Davies v. Stowell, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190; Williamson v. Sammons, 34 Ala. 691; Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272.

assist a poor man to carry on his suit.[8] A single act is not sufficient to constitute the crime of common barratry, but there must be a series of acts, not less than three, the essence of the offense being that the offender shall be a "common" barrator.[9] It is no crime for one to frequently bring unsuccessful actions in his own right, except probably where he brings ungrounded suits, merely for the purpose of annoying his adversary.[10] A justice of the peace is guilty of this crime if he stirs up criminal prosecutions to be brought before himself, as magistrate, for the purpose of obtaining fees.[11] There is no certainty as to the extent to which these offenses as common-law crimes would be recognized in this country. Very many of the courts have refused to recognize the crimes of champerty and maintenance, or have materially restricted the application of the old common-law doctrine.[12]

[8] 4 Bl. Comm. 135.

[9] Com. v. Davis, 11 Pick. (Mass.) 432; Com. v. McCulloch, 15 Mass. 227.

[10] Com. v. McCulloch, 15 Mass. 227.

[11] State v. Chitty, 1 Bailey (S. C.) 379.

[12] Sherley v. Riggs, 11 Humph. (Tenn.) 53; Danforth v. Streeter, 28 Vt. 490; Manning v. Sprague, 148 Mass. 18, 18 N. E. 673, 1 L. R. A. 516, 12 Am. St. Rep. 508; Sedgwick v. Stanton, 18 Barb. (N. Y.) 473, affirmed in 14 N. Y. 289; Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; Winslow v. Railway Co., 71 Iowa, 197, 32 N. W. 330; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Dunne v. Herrick, 37 Ill. App. 180; Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444; Brown v. Bigne, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752. But see Key v. Vattier, 1 Ham. (Ohio) 132. Common law is virtually repealed by statute in many states. Wildey v. Crane, 63 Mich. 720, 30 N. W. 327; Bundy v. Newton, 65 Hun, 619, 19 N. Y. Supp. 734; Byrne v. Railroad Co. (C. C.) 55 Fed. 44.

OBSTRUCTING JUSTICE.

135. It is a misdemeanor at common law to obstruct public or private justice, as by resisting or obstructing an officer in the exercise of his duty, or preventing attendance of witnesses.

Any willful obstruction of justice by resisting an officer who is endeavoring to perform his official duty is a crime at common law,[1] and is also particularly made a crime by statute in many states. A person who resists or obstructs an attempt to make an arrest or maintain the peace,[2] or one who prevents the execution of civil process, as, for instance, the levy of a writ of attachment or replevin,[3] is guilty of obstructing justice. To tamper with witnesses or prevent their attendance is also a crime.[4]

§ 135. [1] 1 Bish. New Cr. Law, § 467; 2 Bish. Cr. Law, § 1009.

[2] People v. Haley, 48 Mich. 495, 12 N. W. 671; People v. Hamilton, 71 Mich. 340, 38 N. W. 921; State v. Dula, 100 N. C. 423, 6 S. E. 89. Resisting unlawful arrest not punishable. See ante, pp. 238, 241. People v. McLean, 68 Mich. 480, 36 N. W. 231; Merritt v. State (Miss.) 5 South. 386; Hamlin v. Com. (Ky.) 12 S. W. 146.

[3] Braddy v. Hodges, 99 N. C. 319, 5 S. E. 17; Com. v. McHugh, 157 Mass. 457, 32 N. E. 650; State v. Barrett, 42 N. H. 466. Resisting attempt to attach exempt property, where no unnecessary force is used, is not punishable. People v. Clements, 68 Mich. 655, 36 N. W. 792, 13 Am. St. Rep. 373. See, also, ante, p. 241. Retaking property levied on and left by officer with third person, not obstructing officer. Davis v. State, 76 Ga. 721. Preventing execution sale, State v. Morrison, 46 Kan. 679, 27 Pac. 133.

[4] 1 Bish. New Cr. Law, § 468.

EMBRACERY.

136. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.[1]

Any corrupt attempt to influence a jury to render their verdict for one side as against the other is a misdemeanor at common law. It may be by offering them money, by using illegitimate persuasions or entreaties, by treating them, or by making promises.[2] Of course, arguments of counsel in open court at the trial of a cause are a legitimate use of influence, and are not within the definition; but it would be a crime to take advantage of the opportunity afforded, in order to corruptly influence the jurors.[3] Where an attempt to influence a jury amounting to embracery is made, it is immaterial whether they give any verdict or not, and, if they give a verdict, it is no defense that it is a true verdict. A juror may himself commit this crime if he corruptly attempts to influence the other jurors.

§ 136. [1] 4 Bl. Comm. 140; State v. Brown, 95 N. C. 685; 2 Bish. New Cr. Law, §§ 384–389; State v. Sales, 2 Nev. 268; Gibbs v. Dewey, 5 Cow. (N. Y.) 503.

[2] People v. Myers, 70 Cal. 582, 12 Pac. 719.

[3] 1 Hawk. P. C. 466; Paul v. City of Detroit, 32 Mich. 108, 118.

ESCAPE, PRISON BREACH, AND RESCUE.

137. The crime of escape is committed

(a) By an officer or other person, having lawful custody of a prisoner, where he voluntarily or negligently allows him to depart from such custody otherwise than in due course of law.

(b) By a prisoner, where he voluntarily departs from lawful custody without breach of prison.

138. Prison breach is the breaking and going out of his place of confinement by one who is lawfully imprisoned.

139. Rescue is the forcible delivery of a prisoner from lawful custody by one who knows that he is in custody.

Escape[1]*—Liability of Officer.*

An officer who voluntarily suffers a prisoner to escape is at common law involved in the same guilt and liable to the same punishment as the prisoner. If the escape is due to the officer's negligence, he is guilty of a misdemeanor only. In order that he may be held criminally liable, however, the prisoner must have been in custody for some criminal matter, and the imprisonment must have been lawful.[2] A private person who has lawfully made an arrest is at common law liable equally for an escape as if he were an officer.

Same—Liability of Prisoner.

A prisoner who escapes from lawful custody without breach of prison commits a misdemeanor only, whatever may have been the crime for which he was in custody. Consent of the officer having him in custody gives a prisoner no right to escape, and furnishes him no defense. If the warrant of arrest or commitment was void, the prisoner is not liable for escaping; but, if the imprisonment was

§§ 137–139. [1] 2 Bish. New Cr. Law, § 1092 et seq.

[2] Hitchcock v. Baker, 2 Allen (Mass.) 431.

lawful, his innocence or guilt is immaterial.[3] It is no defense that the jail was filthy and unhealthy.[4]

Prison Breach.[5]

Under the old common law, any prison breach was a felony, but this was changed by a statute which is part of our common law;[6] and now it is a felony only where the imprisonment was for a felony, and a misdemeanor in other cases. The crime may be committed by one imprisoned on civil process, but in such case it is a misdemeanor only. The question of the prisoner's guilt or innocence is immaterial, but the imprisonment must be lawful, as in case of escape. Where the imprisonment is illegal, as, for instance, where it is under a void warrant, the offense is not committed, provided no more than necessary force is used.[7] It is otherwise where the process of commitment is merely informal.[8] There must be a breaking and an exit. Merely climbing over a prison wall is not a prison breach, though it has been said that it is otherwise if a loose stone is thrown from the top of the wall.[9] The breaking need not necessarily be from a public prison, but may be from any place of confinement, and it seems that forcible breaking from an officer in the street is sufficient.[10] If there is no breaking or force, the crime is merely an escape.

[3] State v. Leach, 7 Conn. 452, 18 Am. Dec. 113; State v. Lewis, 19 Kan. 260, 27 Am. Rep. 113.

[4] State v. Davis, 14 Nev. 439.

[5] 2 Bish. New Cr. Law, § 1070 et seq.

[6] 1 Edw. II, Stat. 2.

[7] State v. Leach, 7 Conn. 452, 18 Am. Dec. 113.

[8] State v. Murray, 15 Me. 100.

[9] Rex v. Haswell, Russ. & R. 458.

[10] 2 Hawk. P. C. c. 18, § 4; Rex v. Bootie, 2 Burrows, 864; Rex v. Stokes, 5 Car. & P. 148; Com. v. Filburn, 119 Mass. 297; State v. Beebe, 13 Kan. 589, 19 Am. Rep. 93.

Rescue.[11]

Rescue is a felony or misdemeanor, according to the crime with which the prisoner is charged. Mere breach of the prison in an attempt to deliver a prisoner is not a rescue, but there must be an actual exit by the prisoner. One who lawfully escapes from imprisonment under a void warrant is not liable because other prisoners lawfully confined escape with him in consequence of his breaking out of the prison.[12]

MISPRISION OF FELONY.

140. Misprision of felony is a criminal neglect either to prevent a felony from being committed or to bring to justice the offender after its commission.[1]

To constitute this offense there must be mere knowledge of the offense, and not an assent or encouragement; for, if the latter, the person becomes principal or accessary. The crime is a misdemeanor. Misprision of treason is explained in treating of treason.

COMPOUNDING CRIME.

141. The offense of compounding a crime, or theft-bote, is committed where one who knows that it has been committed agrees not to prosecute it.[1]

Compounding a felony, or forbearing to prosecute a felon on account of some reward received, is a misdemeanor at

[11] 2 Bish. New Cr. Law, § 1085 et seq.; State v. Garrett, 80 Iowa, 589, 46 N. W. 748.

[12] State v. Leach, 7 Conn. 452, 18 Am. Dec. 113.

§ 140. [1] 1 Bish. New Cr. Law, § 716 et seq.

§ 141. [1] 4 Bl. Comm. 133; 1 Bish. New Cr. Law, § 709 et seq.

common law. The reward need not be money, but any advantage accruing from the felon to the person forbearing is sufficient, as where the owner of stolen goods agrees not to prosecute the thief on consideration of the goods being returned.[2] The crime, however, is not confined to the person particularly injured by the felony, as in the case just mentioned, but any one who, knowing that a felony has been committed, receives a reward on his agreement not to prosecute the felon, is guilty. The mere taking back of stolen goods, without any agreement or showing of favor, is no crime. The crime is complete when the reward is received, and the agreement not to prosecute is made, whether the agreement is carried out or not. In this respect it is something like conspiracy; indeed, it is a conspiracy to prevent public justice. To compound a misdemeanor is indictable at common law, only where the misdemeanor is of a public rather than a private nature.[3] This does not therefore prevent settlements for assaults and private cheats; but to agree not to prosecute for a riot is a crime.[4]

[2] Com. v. Pease, 16 Mass. 91.

[3] Compounding a public misdemeanor (illegal sale of spirituous liquor) is indictable at common law. It is not essential that an offense was committed by the person from whom money is received. State v. Carver, 69 N. H. 216, 39 Atl. 973.

[4] Jones v. Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; Keir v. Leeman, 6 Q. B. 308, 9 Q. B. 371.

PERJURY AND SUBORNATION OF PERJURY.

142. Perjury, at common law, is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. Perjury is a misdemeanor.

143. Subornation of perjury is the procuring of another to commit perjury. Perjury must be actually committed.

The Oath.

The oath must be a lawful one; that is, it must be legally administered by an officer duly authorized;[1] but the form is immaterial, provided the witness professes it to be binding on him.[2] It need not necessarily be taken on the Scriptures. Affirmation by one opposed to swearing on the Scriptures, or any other form of oath authorized by law, is sufficient. An oath in some form is essential, or false testimony will not be perjury.[3] An oath taken on a book believed to be the Scriptures, but not so in fact, will sustain a charge of perjury.[4] The oath must be material; otherwise there is no perjury, even though the facts stated may be material. Thus, where a person falsely swears to an answer in a suit, he does not commit perjury, if he was not re-

§§ 142–143. [1] Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293; Morrell v. People, 32 Ill. 499; U. S. v. Manion (D. C.) 44 Fed. 800; State v. Wilson, 87 Tenn. 693, 11 S. W. 792; U. S. v. Bedgood (D. C.) 49 Fed. 54; Walker v. State, 107 Ala. 5, 18 South. 393; U. S. v. Garcelon (D. C.) 82 Fed. 611.

[2] People v. Travis, 4 Parker, Cr. R. (N. Y.) 213; State v. Gates, 17 N. H. 373; Van Dusen v. People, 78 Ill. 645; State v. Wyatt, 3 N. C. 56; Biggerstaff v. Com., 11 Bush (Ky.) 169.

[3] O'Reilly v. People, 86 N. Y. 154, 40 Am. Rep. 525; Case v. People, 76 N. Y. 242.

[4] People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451.

quired to swear to it, and his oath could not affect the issue or strengthen the answer.[5]

The Proceeding and Jurisdiction.

To constitute perjury at common law, the false testimony must be in a judicial proceeding or course of justice.[6] The making of a false affidavit in other than judicial proceedings, it has been said, is not technically perjury, though it is a misdemeanor.[7] It is, however, generally held that to take a false oath as to an existing fact in any proceeding required or authorized by law for the purpose of establishing a legal right is perjury.[8] To take a false oath to an affidavit required by law is held to be perjury,[9] but it is otherwise if the affidavit is not required by law.[10] Where the false testimony is given in a judicial proceeding, it need not be in reference to the principal issue, but it is sufficient if it is material to any inquiry in the course of the proceeding.[11] The court or tribunal must have jurisdiction of the proceed-

[5] Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539.

[6] 2 Bish. New Cr. Law, § 1026; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; State v. Chamberlin, 30 Vt. 559; State v. Simons, Id. 620; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; State v. Chandler, 42 Vt. 446.

[7] 2 Whart. Cr. Law, § 1267.

[8] Otherwise if the oath is merely promissory,—as an oath of office. State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[9] State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; State v. Estabrooks, 70 Vt. 412, 41 Atl. 499.

[10] People v. Travis, 4 Parker, Cr. R. (N. Y.) 213; Silver v. State, 17 Ohio, 365; People v. Gaige, 26 Mich. 30 (bill in equity not required to be sworn); Davidson v. State, 22 Tex. App. 372, 3 S. W. 662; State v. McCarthy, 41 Minn. 59, 42 N. W. 599.

[11] State v. Keenan, 8 Rich. Law (S. C.) 456. False affidavit for continuance, State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; Sanders v. People, 124 Ill. 218, 16 N. E. 81.

ing in which the false oath is taken,[12] but, if jurisdiction exists, mere irregularities in the proceeding are immaterial.[13]

Intent—Falsity of Testimony.

The false testimony must be willfully and corruptly given.[14] To testify rashly and inconsiderately according to belief, or inadvertently, or by mistake, is not perjury.[15] It is said by Hawkins that no one ought to be found guilty without clear proof that the false oath was taken with some degree of deliberation; for if, upon all the circumstances of the case, it appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise or inadvertency, or a mistake of the true state of the question, it cannot be but hard to make it amount to voluntary and corrupt perjury.[16] To take an oath in good faith, under advice of counsel, is not perjury.[17] Though the fact asserted may be true, it is perjury if the witness believed that it was not true, and corruptly made the assertion.[18] It has been held that it

[12] State v. Furlong, 26 Me. 69; State v. Alexander, 11 N. C. 182; Pankey v. People, 2 Ill. 80; State v. Jenkins, 26 S. C. 121, 1 S. E. 437; Renew v. State, 79 Ga. 162, 4 S. E. 19; State v. Wymberly, 40 La. Ann. 460, 4 South. 161; U. S. v. Jackson, 20 D. C. 424.

[13] State v. Lavalley, 9 Mo. 834; Anderson v. State, 24 Tex. App. 705, 7 S. W. 40; State v. Peters, 107 N. C. 876, 12 S. E. 74; Maynard v. People, 135 Ill. 416, 25 N. E. 740; Smith v. State, 31 Tex. Cr. R. 315, 20 S. W. 707.

[14] U. S. v. Babcock, 4 McLean, 113, Fed. Cas. No. 14,488; State v. Hascall, 6 N. H. 352; Gibson v. State (Tex. App.) 15 S. W. 118.

[15] U. S. v. Atkins, 1 Spr. 558, Fed. Cas. No. 14,474; U. S. v. Passmore, 4 Dall. 372, Fed. Cas. No. 16,005; U. S. v. Moore, 2 Low. 232, Fed. Cas. No. 15,803; Tuttle v. People, 36 N. Y. 434.

[16] 1 Hawk. P. C. 429; 2 Bish. New Cr. Law, § 1045.

[17] U. S. v. Stanley, 6 McLean, 409, Fed. Cas. No. 16,376; State v. McKinney, 42 Iowa, 205; U. S. v. Conner, 3 McLean, 573, Fed. Cas. No. 14,847; Com. v. Clark, 157 Pa. 257, 27 Atl. 723.

[18] 2 Bish. New Cr. Law, § 1043.

is perjury for a witness to swear that he thinks or believes a certain fact when he thinks or believes the contrary,[19] or to swear that a fact exists where he knows nothing about it.[20] For a witness to equivocally use words which in one sense are true, but which he intends to be, and which are, understood in another and an untrue sense, was held perjury in an old English case. According to the weight of authority, drunkenness is a defense, as it may negative the existence of such a state of mind as is capable of giving "willfully corrupt," false testimony; [21] but there are decisions to the contrary.[22]

Materiality of Testimony.

The testimony must be material to the issue or matter of inquiry,[23] but any materiality seems sufficient. Thus, it is perjury to testify to facts affecting the credibility of the witness himself, as on cross-examination, or the credibility of other witnesses.[24] It makes no difference that the tes-

[19] Rex v. Pedley, 1 Leach, 327; Reg. v. Schlesinger, 10 Q. B. 670; Com. v. Edison (Ky.) 9 S. W. 161.

[20] State v. Gates, 17 N. H. 373.

[21] 2 Bish. New Cr. Law, § 1048; Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 903; McCord v. State, 83 Ga. 521, 10 S. E. 437.

[22] People v. Willey, 2 Parker, Cr. R. (N. Y.) 19.

[23] People v. Collier, 1 Mich. 137, 48 Am. Dec. 699; State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Wood v. People, 59 N. Y. 117; Rump v. Com., 30 Pa. 475; Com. v. Pollard, 12 Metc. (Mass.) 225; State v. Smith, 40 Kan. 631, 20 Pac. 529; Jennings v. State (Miss.) 7 South. 462; People v. Perazzo, 64 Cal. 106, 28 Pac. 62; People v. Ah Sing, 95 Cal. 657, 30 Pac. 797; Martin v. Miller, 4 Mo. 47, 28 Am. Dec. 342; Leak v. State, 61 Ark. 599, 33 S. W. 1067; State v. Brown, 68 N. H. 200, 38 Atl. 731.

[24] Com. v. Grant, 116 Mass. 17; Wood v. People, 59 N. Y. 117; State v. Brown, 79 N. C. 642; State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580; Washington v. State, 22 Tex. App. 26, 3 S. W. 228; Williams v. State, 28 Tex. App. 301, 12 S. W. 1103.

timony was legally inadmissible if it was material;[25] nor that defendant was not a competent witness;[26] nor that he could not have been compelled to testify;[27] and it is not necessary that the testimony shall have been believed or have had any influence.[28] The testimony need not necessarily be material to the principal issue in the proceeding, but it is sufficient if it is material to any collateral inquiry in the course of the proceeding.[29]

BRIBERY.

144. Bribery at common law is defined by Blackstone to be where a judge or other officer connected with the administration of justice receives any undue reward to influence his behavior in office;[1] but high authorities define it as the giving or receiving of a reward to influence any official act, whether of a judicial officer or not.[2]

Mr. Bishop states that the gist of the offense of bribery is the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial, and defines the crime as "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done."[3] The crime is committed by

[25] 2 Whart. Cr. Law, §§ 1279. 1280.

[26] Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255.

[27] Mackin v. People, 115 Ill. 312, 3 N. E. 222; Mattingly v. State, 8 Tex. App. 345.

[28] Hoch v. People, 3 Mich. 552; Pollard v. People, 69 Ill. 148.

[29] State v. Keenan, 8 Rich. Law (S. C.) 456; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485.

§ 144. [1] 4 Bl. Comm. 139. See, also, 3 Inst. 145; 2 Russ. Crimes, 122.

[2] 2 Bish. New Cr. Law, § 85; Har. Cr. Law, 84.

[3] 1 Bish. Cr. Law, § 85; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707. See note in 97 Am. Dec. 707. Bribery cannot be

one who gives the bribe, as well as by him who receives it. A mere present to an officer after the act is not bribery if there was no prior understanding.[4] An offer of a bribe, or an offer to accept a bribe, is a crime, though probably an attempt at bribery rather than bribery.[5] A voter, in casting his vote, performs an official act; and bribery of voters is a crime at common law.[6] An offer by a candidate for a county office, made to the voters, that he would, if elected, return part of his salary into the county treasury, was held to constitute bribery;[7] though it was held otherwise where a note was given to induce the people to vote for the removal of the county seat.[8] This crime is very generally regulated by statute. One who conveys an offer to bribe from a third person is himself guilty, though the money is to be paid by the third person;[9] and the third person in such case is also guilty.[10] The offense is generally defined by statute.

predicated on an offer of a reward not to perform duties for the performance of which there is no legal or constitutional warrant. U. S. v. Boyer (D. C.) 85 Fed. 425.

[4] Hutchinson v. State, 36 Tex. 293.

[5] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707. Cf. State v. Miles, 89 Me. 142, 36 Atl. 70.

[6] Reg. v. Lancaster, 16 Cox, Cr. Cas. 737; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; Com. v. McHale, 97 Pa. 397, 39 Am. Rep. 808; State v. Ames, 64 Me. 386. Bribery of member of nominating convention. Com. v. Bell, 145 Pa. 374, 22 Atl. 641, 644. Offer of money to legislator to vote for candidate for United States senator is bribery at common law. State v. Davis, 2 Pennewill, 139, 45 Atl. 394.

[7] State v. Purdy, 36 Wis. 213, 17 Am. Rep. 485.

[8] Dishon v. Smith, 10 Iowa, 212.

[9] People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

[10] People v. Kerr (O. & T.) 6 N. Y. Supp. 674.

MISCONDUCT IN OFFICE.

145. MALFEASANCE—It is malfeasance and a misdemeanor at common law for any public officer, in the exercise of, or under the color of exercising, the duties of his office, to do any illegal act, or abuse any discretionary power with which he is invested by law, from an improper motive. Such malfeasance may be

(a) EXTORTION—Extortion is the taking, under color of office, from any person, any money or valuable thing which is not due from him at the time when it is taken.[1]

(b) OPPRESSION—Oppression consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not amounting to extortion.[2]

(c) FRAUD AND BREACH OF TRUST—It is a misdemeanor for any public officer, in the discharge of the duties of his office, to commit any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.[3]

146. NONFEASANCE—It is nonfeasance and a misdemeanor for any public officer to willfully neglect to perform any duty which he is bound either by common law or by statute to perform, provided the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.[4]

§§ 145–147. [1] Steph. Dig. Cr. Law, art. 119; Com. v. Bagley, 7 Pick. (Mass.) 279; State v. Burton, 3 Ind. 93; People v. Calhoun, 3 Wend. (N. Y.) 420; Loftus v. State (N. J. Err. & App.) 19 Atl. 183; State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Com. v. Saulsbury, 152 Pa. 554, 25 Atl. 610. Extortion distinguished from bribery. People v. McLaughlin, 2 App. Div. 419, 37 N. Y. Supp. 1005. See, also, Williams v. U. S., 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509; Levar v. State, 103 Ga. 42, 29 S. E. 467.

[2] Steph. Dig. Cr. Law, art. 119.

[3] Steph. Dig. Cr. Law, art. 121; State v. Glasgow, 1 N. C. 264, 2 Am. Dec. 629.

[4] Steph. Dig. Cr. Law, art. 122; State v. Kern, 51 N. J. Law, 259, 17 Atl. 114.

147. REFUSAL TO ACCEPT OFFICE—It is a misdemeanor for any person to unlawfully refuse or omit to take upon himself and serve any public office which he is by law required to accept if duly appointed, provided no other penalty is imposed by law for such refusal or neglect, or the law or custom does not permit composition in place of serving.[5]

The above text applies as well to de facto as to de jure officers, for if one claims an office, and assumes to exercise the duties thereof, he must comply with the law; but it seems that it does not apply to executive officers of the government so far as they are clothed with discretion, or to the legislature, or to judges of courts of record performing judicial, as distinguished from ministerial, acts, so as to render them liable to indictment, and that the remedy against them is by impeachment. Justices of the peace are criminally liable for acts not within their judicial discretion. In case of abuse of discretionary power, whether there was an improper motive may be inferred either from the nature of the act or from the circumstances of the case. An illegal exercise of authority, caused by a bona fide mistake as to the law, is not criminal. An example of oppression is where a justice of the peace refuses a license to a person because of the latter's refusal to vote as the justice wishes;[6] and it is extortion for a constable to obtain money from one whom he has in custody on a warrant for assault upon color and pretense that he will procure the warrant to be discharged.[7] An example of fraud and breach of trust affecting the public is where an accountant in public office fraudulently omits to make entries in his accounts, whereby the cashier is en-

[5] Steph. Dig. Cr. Law, art. 123; Rex v. Bower, 1 Barn. & C. 585; 1 Russ. Crimes, 212.

[6] Rex v. Williams, 3 Burrows, 1317.

[7] 2 Chit. Cr. Law, 292.

abled to retain moneys, and appropriate the interest thereon;[8] or where the commissary of public stores contracts with a person for supplies on condition that the latter will divide the profits with him.[9]

Where justices of the peace, whose duty it was to vote for certain officers, made a bargain or reciprocal promise each to vote for a certain candidate, this was held a crime at common law.[10] On the prosecution of an officer for negligence, it seems that mistake of law or fact is no defense, as officers must know the law and the facts necessary to enable them to act.[11] An officer is criminally liable for being drunk when in discharge of his duties.[12]

[8] Rex v. Bembridge, 3 Doug. 332.
[9] Rex v. Jones, 31 How. St. Tr. 251.
[10] Com. v. Callaghan, 2 Va. Cas. 460.
[11] 2 Whart. Cr. Law, § 1582.
[12] Com. v. Alexander, 4 Hen. & M. (Va.) 522.

CHAPTER XIV.

OFFENSES AGAINST THE PUBLIC PEACE.

IN GENERAL.

148. Any willful and unjustifiable disturbance of the public peace, if it is of sufficient magnitude for the law's notice, and does not amount to a felony, is a misdemeanor at common law.[1]

DUELING.

149. It is a misdemeanor at common law [2]
(a) To challenge another to fight a duel, or
(b) To be the bearer of such a challenge, or
(c) To provoke another to send a challenge.

To constitute these crimes, no actual fighting is necessary. Provocation, however great, is no justification. As we have seen, if a duel actually takes place, and one of the parties is killed, the other is guilty of murder, and all who are present abetting the crime are guilty as principals in the

§§ 148–149. [1] 1 Bish. New Cr. Law, § 533 et seq.

[2] 2 Bish. New Cr. Law, §§ 311–317; 4 Bl. Comm. 150; 1 East, P. C. 242; 1 Hawk. P. C. 487; State v. Perkins, 6 Blackf. (Ind.) 20; State v. Farrier, 8 N. C. 487; Com. v. Lambert, 9 Leigh (Va.) 603; Com. v. Tibbs, 1 Dana (Ky.) 525.

second degree.[3] It is immaterial that the duel is to take place in another state.[4]

UNLAWFUL ASSEMBLY, ROUT, AND RIOT.

150. UNLAWFUL ASSEMBLY—An unlawful assembly is an assembly of three or more persons

(a) With intent to commit a crime by open force, or

(b) With intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons reasonable grounds to apprehend a breach of the peace.[1]

151. ROUT—A rout is an unlawful assembly which has made a motion towards the execution of the common purpose of the persons assembled.[2]

152. RIOT—A riot is

(a) An unlawful assembly which has actually begun to execute the purpose for which it assembled, by a breach of the peace, and to the terror of the public; or

(b) A lawful assembly may become a riot if the persons assembled form and proceed to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled.[3]

To constitute these crimes at common law, three persons are essential,[4] though this is changed by statute in some

[3] Cullen v. Com., 24 Grat. (Va.) 624; Reg. v. Young, 8 Car. & P. 644; Smith v. State, 1 Yerg. (Tenn.) 228.

[4] 2 Bish. New Cr. Law, § 315; State v. Farrier, 8 N. C. 487; Harris v. State, 58 Ga. 332.

§§ 150–152. [1] Steph. Dig. Cr. Law, art. 70; 1 Hawk. P. C. 513; State v. Stalcup, 23 N. C. 30, 35 Am. Dec. 732.

[2] Steph. Dig. Cr. Law, art. 71.

[3] Steph. Dig. Cr. Law, art. 72; Fisher v. State, 78 Ga. 258; Riley v. People, 29 Ill. App. 139; Perkins v. State, 78 Ga. 316; Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148; State v. Brown, 69 Ind. 95, 35 Am. Rep. 210.

[4] Com. v. Gibney, 2 Allen (Mass.) 150; Turpin v. State, 4 Blackf. (Ind.) 72; Com. v. Edwards, 1 Ashm. (Pa.) 46. Riot may be com-

states.[5] If three persons meet together for the purpose of beating another who lives a mile off, there is an unlawful assembly; while they are on the road to carry out the purpose, there is a rout; and, when they make the attack and beat him, there is a riot. To constitute a riot, the object need not be unlawful, provided the acts are done in a manner calculated to inspire terror. For the Salvation Army to assemble and march through the streets might, under some circumstances, constitute a common nuisance, but it would not be an unlawful assembly, for there is no unlawful purpose, and the assembly is not tumultuous, nor against the peace;[6] but it is an unlawful assembly for a number of persons to meet at a house, and disguise themselves, for the purpose of going out on a poaching expedition.[7]

In a South Carolina case, where money had been staked for a prize fight, and the crowd was assembled, this was held to constitute a rout. It was said by the court: "The parties had no doubt assembled with a common intent to commit a breach of the peace. Preparations had been made for the combat, and blows only were necessary to constitute the offense of riot beyond all doubt. What degree of execution of their purpose will convert a rout into a riot it may be often difficult to determine, but this case does not require any such distinction to be made. The preparation

mitted where only two are engaged in the physical act, and a third is present, abetting. State v. Straw, 33 Me. 554.

[5] Dougherty v. People, 4 Scam. (Ill.) 179; Logg v. People, 92 Ill. 598; Rachels v. State, 51 Ga. 374; Stafford v. State, 93 Ga. 207, 19 S. E. 50; Dixon v. State, 105 Ga. 787, 31 S. E. 750.

[6] Beatty v. Gillbanks, 15 Cox, Cr. Cas. 138; Reg. v. Clarkson, 66 Law T. (N. S.) 297.

[7] Rex v. Brodribb, 6 Car. & P. 571; Reg. v. Vincent, 9 Car. & P. 109.

for battle, the staking the money, will clearly make them guilty of a rout." [8]

In another South Carolina case a party of men who had assembled at night in the streets of a village, and out of fun made a great noise, by yelling, shooting firearms, and blowing horns, were convicted of riot. The court said: "If a tumultuous or noisy act be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot; as if a dozen men assemble together in a forest, and blow horns or shoot guns, or such acts, it would not be a riot. But if the same party were to assemble at the hour of midnight in the streets of Charleston or Columbia, and were to march through the streets crying 'Fire!' blowing horns, and shooting guns, few, I apprehend, would hesitate in pronouncing it a riot, although there might be no ordinance of the city for punishing such conduct; and why? Because such conduct in such a place is calculated to excite terror and alarm among the citizens." [9]

[8] State v. Sumner, 2 Speers, 599, 42 Am. Dec. 387.

[9] State v. Brazil, Rice, 257. Attempt to ride a person on the rail, State v. Snow, 18 Me. 346. Congregating to prevent removal of prisoner and intimidating sheriff. Green v. State, 109 Ga. 536, 35 S. E. 97. All persons connected with the common purpose are guilty, whether their conduct is violent and tumultuous or not. Baptist v. State, 109 Ga. 546, 35 S. E. 658. See, also, Coney v. State (Ga.) 39 S. E. 425.

AFFRAY.

153. An affray is the fighting of two or more persons in a public place, to the terror of the people, and is a misdemeanor.[1]

An affray differs from a riot in that there must be premeditation and at least three persons to constitute the latter. To constitute an affray, the fighting must be in a public place; for, if it is in private, there is an assault and battery only.[2] A mere dispute, with loud and angry words, does not amount to an affray if there are no blows, for there is no fighting; but it has been held that if one person, by such abusive language towards another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty, though he may be unable to return the blow.[3] To render one guilty, he must be unlawfully fighting by agreement, and not merely defending himself against an attack by his adversary.[4] From the nature of the crime, two persons are necessary; one person alone cannot commit it.[5]

§ 153. [1] 2 Bish. New Cr. Law, §§ 1–7.

[2] Taylor v. State, 22 Ala. 15; Carwile v. State, 35 Ala. 392; Wilson v. State, 3 Heisk. (Tenn.) 278. Two persons fighting after challenge in presence of a third. Piper v. State (Tex. Cr. App.) 51 S. W. 1118.

[3] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Perry, 50 N. C. 9, 69 Am. Dec. 768; State v. Fanning, 94 N. C. 940, 55 Am. Rep. 653.

[4] Klum v. State, 1 Blackf. (Ind.) 377; State v. Harrell, 107 N. C. 944, 12 S. E. 439.

[5] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; O'Neill v. State, 16 Ala. 65.

FORCIBLE ENTRY AND DETAINER.

154. Forcible entry is where a person violently enters upon real property occupied by another, with menaces, force, and arms, and without the authority of law.

155. Forcible detainer is detention of the possession of the property by the same kind of force, and may be either where the original entry was forcible or where it was peaceable.

Forcibly entry and forcible detainer were crimes under the old common law, and were also defined and declared by early English statutes, which are the common law with us. To constitute a forcible entry, there must be more force than is sufficient to make the entry a mere trespass. Some violence must be used, or rather some apparent violence; for there may be no actual force, its place being supplied by the presence of such a number of people as to terrorize the occupants of the premises, or by menaces and threats, reasonably leading them to believe that bodily injury will be done unless they give up the possession. Entry by a mere trick is not forcible. One may be prosecuted for forcible entry alone, or for forcible detainer, or for both.[1]

§§ 154–155. [1] 2 Whart. Cr. Law, § 1083; 2 Bish. New Cr. Law, § 489; Harding's Case, 1 Greenl. (Me.) 22; Rex v. Blake, 3 Burrows, 1731; Kilpatrick v. People, 5 Denio (N. Y.) 277; Com. v. Edwards, 1 Ashm. (Pa.) 46; Com. v. Powell, 8 Leigh (Va.) 719; Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160; State v. Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844; State v. Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841. Forcible entry is a misdemeanor under a provision that offenses recognized by the common law shall be punished. Ex parte Webb, 24 Nev. 238, 51 Pac. 1027.

LIBELS ON PRIVATE PERSONS.

156. The books differ greatly in defining libel, but, subject to qualifications hereafter stated, it may be defined generally as the malicious publication of any writing, sign, picture, effigy, or other representation tending to expose any person to hatred, contempt, or ridicule.[1]

157. The word "libel" is used to denote both the defamatory matter published and the offense of publishing it.

Libel is a misdemeanor at common law. The crime is regarded as one which affects the public peace. The law punishes publication of defamatory matter concerning another, not because of the injury to the reputation, but because it is calculated to provoke a breach of the peace.[2] The publication of defamatory matter concerning the character of a dead person is criminal if it is calculated to bring living people into hatred, contempt, or ridicule, but not otherwise.[3] Any words or signs conveying defamatory matter marked upon any substance, and anything which by its own nature conveys defamatory matter, as, for instance, a passage in a newspaper, words written on a wall, or a gallows set up before a man's door, may be a libel. Defamatory matter is any matter which either directly or by insinuation or irony tends to expose any person to hatred, contempt, or ridicule.[4] If it has not this effect, it is not libelous.[5] As

§§ 156–157. [1] 2 Bish. New Cr. Law, § 907 et seq.; 2 Whart. Cr. Law, § 1594 et seq.; Steph. Dig. Cr. Law, art. 267 et seq.; Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212.

[2] Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; State v. Hoskins, 60 Minn. 168, 62 N. W. 270, 27 L. R. A. 412.

[3] Rex v. Topham, 4 Term R. 126.

[4] State v. Smiley, 37 Ohio St. 30, 41 Am. Rep. 487.

[5] People v. Jerome, 1 Mich. 142.

the gist of the crime is to provoke retaliation and breach of the peace, it is at common law no defense to say that the matter published was true;[6] but this rule has been very much modified by statute. As a rule, one is not criminally liable for slander or spoken words.[7]

Publication.

Publication of a writing, sign, or other matter is necessary to make it a criminal libel. This may be by delivering it, sending it by mail, reading it, exhibiting it, or communicating its purport in any other manner to any person other than (perhaps) the person libeled.[8] It has been held that delivery only to the person defamed is not libel, for there is no publication.[9] But, since the gist of the offense is the tendency of the libel to provoke a breach of the peace, it seems that sending the libelous matter to the person libeled, although it reaches no third person, is a sufficient publication, and it has been frequently so held.[10] A person, to be liable for publishing a libel, must have known or had an opportunity to know its contents.[11] A libel may be published by a servant so as to render his master liable, as when a book or paper containing a libel is sold by a clerk in the regular course of business in a bookseller's shop or news-

[6] Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217; Com. v. Morris, 1 Va. Cas. 176, 5 Am. Dec. 515; State v. Hinson, 103 N. C. 374, 9 S. E. 552.

[7] Reg. v. Langley, 3 Salk. 190; Rex v. Penny, 1 Ld. Raym. 153.

[8] Swindle v. State, 2 Yerg. (Tenn.) 581, 24 Am. Dec. 515; see Steph. Dig. Cr. Law, art. 270.

[9] State v. Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616.

[10] Reg. v. Brooke, 7 Cox, Cr. Cas. 251; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105. It is otherwise in civil libel. Sheffill v. Van Deusen, 13 Gray (Mass.) 304, 74 Am. Dec. 632.

[11] Rex v. Burdett, 4 Barn. & Ald. 95, 126; Steph. Dig. Cr. Law, art. 273.

paper office.[12] Publication in a newspaper circulating in one state, but published in another, is a publication in the former.[13]

Privileged Communications.

There are some circumstances under which one has a right to publish defamatory matter, in which case the publication is said to be a privileged communication. Thus, if the defamatory matter is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing it is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, and the publication does not exceed in extent or manner what is reasonably sufficient for the occasion, the publication is privileged.[14] Such is the case where one is asked the character of his former servant by one about to engage him. He may reply to the inquiry by letter, but he cannot publish the letter in a newspaper. Other instances are where information concerning a man's character is published to a relative about to marry him, and communications in business affairs. The publication of defamatory matter is also privileged if it consist of comments on persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided such comments are fair. A fair comment is a comment which is true, or which, if false, expresses the real opinion of its author; such opinion having been formed with a reasonable

[12] Rex v. Almon, 5 Burrows, 2686; ante, p. 117.

[13] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214. One who dictates a slander to a reporter for publication is responsible for the libel if it is published. State v. Osborn, 54 Kan. 473, 38 Pac. 572.

[14] Steph. Dig. Cr. Law, art. 273.

degree of care and on reasonable grounds.[15] A person taking part in public affairs, publishing literary productions or works of art, or taking part in a dramatic performance or other public entertainment, submits himself, his book, picture, etc., to public criticism.[16] One may also publish legislative proceedings and speeches,[17] proceedings in courts of justice,[18] and may make communications as to a candidate's character to the elective or appointive power.[19] Communications in the course of judicial proceedings are privileged if they are pertinent and material to the subject of the controversy, whether they are made by a party to the proceeding, or by his attorney, and whether they are malicious or not; but it is otherwise if they are not pertinent to the subject of the controversy.[20] An attorney may be indicted for inserting libelous matter in a pleading if it is not relevant to the controversy, and is inserted merely to annoy the party defamed, and subject him to ridicule and contempt.[21] Any abuse of the privilege renders the author of the publication criminally liable.[22]

Malice.

Malice is necessary to render one criminally liable for publishing a libel, but it need not be shown that he was actuated

[15] Steph. Dig. Cr. Law, art. 274.

[16] Id.; Com. v. Clap, 4 Mass. 163, 3 Am. Dec. 212; State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217; Com. v. Morris, 1 Va. Cas. 176, 5 Am. Dec. 515. See Carr v. Hood, 1 Camp. 355 (literary criticism); Marks v. Baker, 28 Minn. 162, 9 N. W. 678 (candidate for office).

[17] Steph. Dig. Cr. Law, art. 275.

[18] Steph. Dig. Cr. Law, art. 276; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Com. v. Costello, 1 Pa. Dist. R. 745.

[19] Steph. Dig. Cr. Law, art. 274.

[20] Gilbert v. People, 1 Denio (N. Y.) 41, 43 Am. Dec. 646.

[21] Id.

[22] 2 Bish. New Cr. Law, § 913 et seq.; 2 Whart. Cr. Law, § 1629 et seq.

by personal hatred and ill will towards the person libeled. No specific intent is essential. The rule that a person is deemed to intend the natural and probable consequences of his acts prevails, and the intentional publication of defamatory matter is malicious.[23] Malice is inferred from the fact of publication.[24] As we have seen, a person may be liable for a publication by his servant made without his knowledge.[25]

Other Libels.

There are certain other crimes called "libels" which cannot be properly treated in this connection, as they are not punished on the ground that they tend to breaches of the peace. They are essentially different from libels against private persons, or defamatory libels, and are punished on altogether different grounds. These are blasphemous libels, obscene libels, and seditious libels. Blasphemous libels are malicious publications reviling Christianity as a religious faith, and are indictable at common law, because they tend to disturb the comfort and insult the religious convictions of the public generally, and are therefore a nuisance, and probably they are punished for the further reason that they tend to provoke retaliation, and therefore to breaches of the public peace.[26] Obscene libels are the publication of indecent and obscene books and pictures. They are punished on the ground that they tend to shock and corrupt the public morals, and are therefore common nuisances. We have

[23] Rex v. Harvey, 2 Barn. & C. 257; State v. Mason, 26 Or. 273, 38 Pac. 130, 26 L. R. A. 779, 46 Am. St. Rep. 629; Benton v. State, 59 N. J. Law, 551, 36 Atl. 1041.

[24] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Com. v. Bonner, 9 Metc. (Mass.) 410; Pledger v. State, 77 Ga. 242, 3 S. E. 320.

[25] Ante, p. 119.

[26] Ante, p. 348; 2 Whart. Cr. Law, § 1605.

already sufficiently considered this crime.[27] Seditious libels are publications tending to bring the government into contempt, or tending to expose to hatred, ridicule, or contempt foreign potentates, ambassadors, etc.[28]

[27] Ante, p. 347; 2 Whart. Cr. Law, §§ 1606–1610.
[28] 2 Whart. Cr. Law, §§ 1611–1617.

CHAPTER XV.

OFFENSES AGAINST THE GOVERNMENT.

TREASON AND MISPRISION OF TREASON.

158. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [1]

159. There are similar provisions in the constitutions and statutes of the different states defining treason against the state, in the absence of which it is a common-law crime.[2]

160. MISPRISION—Every one owing allegiance, and having knowledge of the commission of treason against the United States, or, under state statutes, against the state, is guilty of misprision of treason if he conceals it, and does not as soon as may be disclose and make known the same.[3]

In England treason was divided into high and petit treason. The former embraced acts directed particularly against the sovereign; while petit treason consisted of the murder of a superior by an inferior in natural, civil, or spiritual relation, as of a husband by his wife, a master by his servant, or a lord or ordinary by an inferior ecclesiastic. What was petit treason, however, is no longer recognized as treason, but the offenses are now regarded as homicide.[4]

By the ancient common law it was left very much to dis-

§§ 158–160. [1] Const. U. S. art. 3, § 3, cl. 1; Rev. St. U. S. § 5331.

[2] 2 Whart. Cr. Law, § 1812.

[3] Rev. St. U. S. § 5333.

[4] Ante, p. 39.

cretion to determine what was treason, and the judges, holding office at the pleasure of the crown, raised many offenses to treason which could be deemed such only by force and arbitrary construction, such as killing the king's father or brother, or even his messenger, and other acts tending to diminish the royal dignity of the crown. The grievance of these constructive treasons led in the reign of Edward III to the enactment of a statute [5] declaring and defining the different branches of treason, which is the basis of the law of treason in England.[6] The early statute, although it makes numerous acts treason which are not such in this country, contains words which are reproduced in the provision of the constitution of the United States, and declares it high treason "if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere."

With us there can be no treason against the United States, except as the constitution provides. To constitute treason by leving war, there must be war against the United States; [7] and, to constitute war, there must be an overt act of war. Conspiracy to levy war against the government, without any overt act of war, would not amount to treason. The war must be directed against the government. War to effect private ends is not treason. Merely forcibly to resist the law, and fire at government troops endeavoring to enforce

[5] 25 Edw. III, St. 5, c. 2.

[6] 1 Hawk, P. C. (Curw. Ed.) p. 7, § 1; Story, Const. § 1799. See Steph. Dig. Cr. Law, arts. 51–59, and Append. note 5.

[7] See Ex parte Bollman, 4 Cranch, 75, 126, 2 L. Ed. 554; U. S. v. Burr, 4 Cranch, 469, 2 L. Ed. 684; U. S. v. Hoxie, 1 Paine, 265, Fed. Cas. No. 15,407; U. S. v. Hanway, 2 Wall. Jr. 139, Fed. Cas. No. 15,299; U. S. v. Insurgents, 2 Dall. 335, Fed. Cas. No. 15,443; U. S. v. Mitchell, 2 Dall. 348, Fed. Cas. No. 15,788; Fries' Case, Whart. St. Tr. 610, 634, Fed. Cas. No. 5,127; U. S. v. Pryor, 3 Wash. C. C. 234, Fed. Cas. No. 16,096.

it, is not treason, where the resistance is purely for a private purpose.[8] As said by Mr. Wharton, "the offense must be a levying war with the intent to overthrow the government as such, not merely to resist a particular statute or to repel a particular officer." [9] To constitute treason by adhering to the enemies of the United States, the enemy must be a hostile foreign power, and not merely citizens of the United States engaged in a rebellion or insurrection against them, for they are still citizens, and not enemies, within the meaning of the constitution. Any voluntary assistance given to a foreign power engaged in war with the United States is treason. One who joins the enemies of his government from fear of immediate death or grievous bodily harm threatened in case of his refusal to yield is regarded as acting under compulsion, and is not guilty of treason; but a less danger, or danger to property only, will not excuse him. An alien owes a local allegiance to the sovereign in whose country he is temporarily sojourning, and may be guilty of treason against him, even by aiding his own sovereign. The punishment for treason is death, or imprisonment and fine, at the discretion of the court. For misprision of treason, the punishment is fine and imprisonment.[10] It is expressly provided by the federal constitution that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." [11]

There may also be treason against a state, a crime which is not necessarily also treason against the United States. Treason may be committed against a state by armed opposition to its laws, or by forcibly attempting to overthrow or

[8] U. S. v. Hoxie, 1 Paine, 265, Fed. Cas. No. 15,407.

[9] 2 Whart. Cr. Law, § 1797.

[10] Id. §§ 1782–1820.

[11] Const. U. S. art. 3, § 3, cl. 1.

usurp the government. Conversely, treason against the United States, unless expressly so declared, is not an offense against the laws of a particular state. It is a crime which is directed against the national government, and exclusively cognizable in its courts.[12]

Other Similar Crimes.

Among the other crimes against the United States government in the nature of, but not amounting to, treason, is seditious conspiracy; that is, a conspiracy between persons in any state or territory to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, etc. It is also a crime for any person to recruit soldiers or sailors within the United States to engage in armed hostility against the same, or to open a recruiting station within the United States for such purpose; for any person to enlist or engage within the United States with intent to serve in armed hostility against the same; to incite or aid in a rebellion; and for a citizen of the United States to correspond with foreign governments with intent to influence their controversies with the United States, or to defeat the measures of the United States government.[13]

[12] People v. Lynch, 11 Johns. 549; Respublica v. Carlisle, 1 Dall. (Pa.) 35, 1 L. Ed. 26. See Black, Const. Law, 518, 519; 2 Whart. Cr. Law, §§ 1812–1818.

[13] 2 Whart. Cr. Law, §§ 1785–1789.

OFFENSES AGAINST THE POST OFFICE.

By acts of congress, it is a crime to intentionally or negligently obstruct the transmission or delivery of the mail; to inclose letters with printed matter; to detain letters; to destroy letters; to post obscene books; to counterfeit stamps; to commit larceny, robbery, or embezzle from the mail; or to receive an article stolen from the mail.[14]

ABUSE OF ELECTIVE FRANCHISE.

Illegal voting is a crime at common law, and is also regulated by acts of congress and by the statutes of the different states. It is also a crime at common law for a person to usurp an office to which he has no claim, or to offer violence to voters. By statutes, betting at elections is made a crime.[15]

FORESTALLING, REGRATING, AND ENGROSSING.

These were old common-law crimes consisting substantially in buying up and hoarding provisions and other products for the purpose of obtaining a monopoly, and selling them at an enhanced price. They have been abolished in England, and have not been recognized as common-law crimes with us; but Mr. Wharton states that to obtain a monopoly of a necessary commodity for the purpose of selling for grossly extortionate prices would still be indictable at common law. Such questions generally arise in prosecutions for conspiracies, as it is in this way that monopolies are usually obtained.[16] The matter is very generally regulated by statutes.[17]

[14] Id. §§ 1822–1831.
[15] Id. §§ 1832–1848.
[16] Ante, p. 146.
[17] 2 Whart. Cr. Law, §§ 1849–1851.

CHAPTER XVI.

OFFENSES AGAINST THE LAW OF NATIONS.

PIRACY

161. Piracy is "robbery or forcible depredation on the high seas, without lawful authority, and done animo furandi, and in the spirit and intention of universal hostility. It is the same offense at sea with robbery on land." [1] Piracy is a felony.

Piracy is an offense against the law of nations, which is a part of the common law; but, as we have seen, there are no crimes punishable by the United States under the common law ex proprio vigore. The constitution of the United States, however, gives congress the power "to define and punish piracies and felonies on the high seas and offenses against the law of nations," [2] and congress has passed a statute declaring that "every person who on the high seas commits the crime of piracy, as defined by the law of nations, and is afterwards brought into or found in the United States, shall suffer death." [3]

It was said by Nelson, J., in reference to the crime of piracy, on the trial of the officers and crew of the privateer Savannah: "This is defined to be a forcible depredation upon property upon the high seas without lawful authority, done animo furandi; that is, as defined in this connection, in a spirit and intention of universal hostility. A pirate

§ 161. [1] 1 Kent, Comm. 183.

[2] Const. U. S. art. 1, § 8.

[3] Rev. St. U. S. § 5368; U. S. v. Smith, 5 Wheat. 153, 5 L. Ed. 57.

[under the law of nations] is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason, pirates, according to the law of nations, have always been compared to robbers; the only difference being that the sea is the theater of the operations of one, and the land of the other. And, as general robbers and pirates upon the high seas are deemed enemies of the human race,—making war upon all mankind indiscriminately, the crime being one against the universal laws of society,—the vessels of every nation have a right to pursue, seize, and punish them." [4]

OTHER OFFENSES.

Congress has also declared it a crime for any person to violate any safe conduct or passport duly obtained or issued under authority of the United States; to assault, wound, or imprison, or in any other manner offer violence to, the person of a public minister, in violation of the law of nations; [5] to commit breaches of neutrality by serving, or setting on foot, within the United States, military expeditions, against a foreign state at peace with the United States; [6] or to forge and counterfeit, within the United States, notes, bonds, and other securities of foreign governments.[7] There are many other statutes which it would serve no useful purpose to mention specially.[8]

[4] Savannah Pirates, Warburton's Trial of the Officers and Crew of the Privateer Savannah, pp. 370, 371.

[5] Rev. St. U. S. § 4062.

[6] U. S. v. Ybanez (C. C.) 53 Fed. 536.

[7] U. S. v. Arjona, 120 U. S. 479, 7 Sup. Ct. 628, 30 L. Ed. 728.

[8] Post, p. 427.

CHAPTER XVII.

JURISDICTION.

TERRITORIAL LIMITS OF STATES AND UNITED STATES.

162. UNITED STATES—ON THE OCEAN—The territorial limits of the United States, regarded as one nation, extend into the ocean at least the distance of a marine league.

163. SAME—LAND BOUNDARIES—The boundaries between the United States and the countries lying adjacent are determined by treaties, under which, where the countries are divided by rivers or streams, and where they are divided by the Great Lakes, the lines have, as a rule, been run in the middle of the river, stream, or lake.[1]

164. STATES—The territorial limits of the states on the borders of the United States, both on the sea and land, are, as a rule, coincident with the territorial limits of the United States. The boundaries between the states are determined, in case of the original states, by their charters and subsequent compacts, and, in case of the others, by the acts admitting them into the Union.

United States Limits.

The territorial limits of a country, where it borders on the ocean, are determined by the law of nations, and by that

§§ 162–164. [1] Tyler v. People, 8 Mich. 320.

law it has been held to extend outward into the ocean as far as a cannon ball will reach. This distance has been estimated as a marine league, or about three and a half English miles. "It must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast." [2] Beyond this distance the ocean is the common highway of all nations, no one nation having the right to assume control of it. The distance is measured from low-water mark on the actual shore, but from islands if they are so near the mainland that the intervening waters cannot be regarded as the high sea. Bays and other arms of the sea wholly within the territory of a country, not exceeding two marine leagues in width at the mouth, are within the territorial limit.[3] The Delaware and Chesapeake Bays, although the latter between the outside headlands is twelve miles or more wide, so that a marine league measured from each shore would not cover the entire width, are claimed to be within the territorial limits of the United States. It has even been said that the United States would have the right, if deemed necessary, to extend its jurisdiction over the adjacent waters of the ocean to lines stretching between distant headlands; as, for instance, from Cape Ann to Cape Cod, from Nantucket to Montauk Point, and from the south cape of Florida to the mouth of the Mississippi river.[4]

[2] Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159, affirming Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820. See Reg. v. Keyn, 2 Exch. Div. 63, 13 Cox, Cr. Cas. 403.

[3] Manchester v. Massachusetts, supra.

[4] 1 Kent, Comm. 29; 1 Bish. New Cr. Law, §§ 102–108; Tyler v. People, 8 Mich. 320. See Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 App. Cas. 394.

State Limits.

The states bordering on the ocean extend out, as does the United States, at least the distance of a marine league. Those on the Great Lakes extend to the boundary line between the United States and Canada. Rivers and bays extending into a state are a part of its territory. Usually, where the states are divided by rivers, the limits of each state extend to the middle of the stream; but there are exceptions in case of the Hudson river, between New York and New Jersey, the exclusive jurisdiction over which is in New York, and of the Ohio river, between Ohio and Kentucky, the whole river being in Kentucky. The states on the Mississippi river which were formed out of the Northwest Territory have concurrent jurisdiction over the whole river.[5]

County Limits.

Under the common law, counties on the sea do not extend out to the state limits, but stop at the water line. Bays and other arms of the sea, however, across which objects can be reasonably discerned with the naked eye, it was declared, are within county limits.[6] A state, however, may extend the limits of its counties so as to make them coincide with its own limits, and this has been done in some states. Counties bordering on the Great Lakes would probably extend at common law to the Canadian line. They are so

[5] 1 Bish. New Cr. Law, §§ 145–151; Com. v. Peters, 12 Metc. (Mass.) 387; Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820; U. S. v. Bevans, 3 Wheat. 336, 4 L. Ed. 404; U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Booth v. Shepherd, 8 Ohio St. 243; McFall v. Com., 2 Metc. (Ky.) 394; State v. Babcock, 30 N. J. Law, 29.

[6] See 1 Bish. New Cr. Law, § 146. Cf. Direct U. S. Cable Co. v Anglo-American Tel. Co., supra; Com. v. Manchester, supra.

extended by statute in New York. Otherwise than has been stated, the boundaries of counties coincide with the state lines, where they are on the border, and the other boundaries are fixed by the acts of the legislature.[7]

JURISDICTION AS DETERMINED BY LOCALITY OF OFFENSE.

165. As a general rule, applicable to the United States, the courts of a country cannot punish a person for acts committed without its territorial limits, as the laws of a country have no extraterritorial effect, except that

EXCEPTIONS—(a) The ships of a nation are regarded as floating parts of its territory, and it may punish offenses committed thereon, wherever the ship may be.

(b) A nation has the power to punish offenses committed by its subjects abroad.

(c) A person abroad may be guilty of a crime consummated within the territorial limits of a country, as where he acts through an innocent agent, or otherwise puts in motion a force which takes effect within such limits.

166. STATES—A state probably has no jurisdiction to punish for acts committed beyond its territorial limits by others than its own citizens.

167. It possibly has jurisdiction to punish acts committed by its own citizens abroad.

168. It may, like any other sovereignty, punish for acts committed without, but which take effect and constitute a crime within its limits.

Offenses on Shipboard.

It is a rule of international law that vessels, whether they belong to the government itself, or to private citizens, are regarded as part of the territory of the nation under whose

[7] 1 Bish. New Cr. Law, §§ 145–151; Manley v. People, 7 N. Y. 295; Com. v. Peters, 12 Metc. (Mass.) 387; Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820; Biscoe v. State, 68 Md. 294, 12 Atl. 25.

flag they sail, and that the country of the flag may punish for crimes committed on board, either by her own subjects or by foreigners, wherever the vessel may be. This rule, however, is subject to the qualification that if the vessel is a private one, and is in a foreign port, it is also subject to the laws of the foreign country; and crimes committed on such vessel are cognizable by the foreign country, at least if they are of a character to disturb the peace of that country, as well as by the country of the flag.[1] If those laws conflict with the laws of the flag, they will govern, and doubtless an act committed in violation of them would not be punished by the home government, though a violation of its laws. Jurisdiction to punish for offenses committed on American ships on the high seas and in foreign ports is conferred by act of congress on the federal courts. The state courts can have no such jurisdiction.[2]

Offenses by Subjects Abroad.

Under the law of nations, a country has the power to punish crimes committed by its own subjects abroad, not only in barbarous and unsettled lands, but in civilized countries as well, and this power exists whether the crime be an injury particularly to the government itself or the foreign government, or to another subject, or to a subject of the foreign government. The home government cannot go into the foreign country to arrest the offender without its consent, but this difficulty is generally obviated by treaty provisions for extradition. This power has been distinctly

§§ 165–168. [1] Reg. v. Anderson, 11 Cox, Cr. Cas. 198. See Wildenhus' Case, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565.

[2] 1 Bish. New Cr. Law, § 117; U. S. v. Holmes, 5 Wheat. 412, 5 L. Ed. 122; U. S. v. Imbert, 4 Wash. C. C. 702, Fed. Cas. No. 15,438; U. S. v. Pirates, 5 Wheat. 184, 5 L. Ed. 64; U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; U. S. v. Palmer, 3 Wheat. 610, 4 L. Ed. 471.

recognized by congress by making it a crime for a citizen of the United States, whether in the United States or a foreign country, to correspond with any foreign government, or officer or agent thereof, with intent to influence the measures or conduct of any foreign government, or any officer or agent thereof, in relation to any disputes or controversies with the United States;[3] by making it a crime to commit perjury or subornation of perjury abroad before consular and other officers of the United States, authorized to administer oaths;[4] and by providing for consular courts abroad to punish offenses.[5]

Same—Jurisdiction of States.

Though, by the federal constitution, the states have ceded to the United States all diplomatic authority, and can exercise none themselves, and cannot therefore be regarded as nations in the full sense of that term, yet they are sovereigns in their own territory, and with respect to matters which relate peculiarly to their own internal affairs. They retain all the rights incident to sovereignty which have not been ceded to the federal government. In view of this fact, they certainly must have some jurisdiction over their citizens abroad. Having ceded to the general government all diplomatic power, they themselves are not recognized by foreign nations,[6] and cannot protect their citizens abroad; and for this reason it is claimed that they have no right to punish them. The laws of all of the states provide for the punishment of treason against the state, which, as has been seen, is the waging of war against the state, or adhering to its enemies, giving them aid and comfort. Can it be that

[3] Rev. St. U. S. § 5335.

[4] Id. § 4683 et seq.

[5] 1 Bish. New Cr. Law, § 121 et seq.

[6] People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483.

if a citizen of a state goes beyond its limits, and there adheres to its enemies, and wages war against it, the state is powerless to punish him when he returns into the state? Or, if a state sends an agent abroad to negotiate its bonds, can he embezzle them, and return into the state, and object to its jurisdiction to punish him? The right of a state to punish its citizens for acts committed abroad has been upheld by the courts of Virginia and Wisconsin, but has been denied by those of New York and Michigan. The question, therefore, is not settled.[7]

Offenses by Foreigners Abroad—United States.

As just stated, congress has made it a crime to commit perjury or subornation before its consular and other officers abroad. It will be noticed that this applies to perjury by foreigners, as well as by subjects of the United States.

Same—States.

Whether a state has power by statute to confer jurisdiction upon its courts to punish acts committed by one not a citizen, wholly in another jurisdiction, although injuriously affecting persons within the state, is doubtful, but the prevailing view is against the existence of such power.[8] By an early statute of North Carolina, residents of other states were declared punishable in North Carolina for counterfeiting its bills of credit, the same as if the offense had been committed within its limits. The North Carolina court, however, on prosecution of a citizen of Virginia for counterfeiting in Virginia, held that, if the statute could be held to apply to acts committed in another state by a citizen of such

[7] 1 Bish. New Cr. Law, § 152 et seq.; Com. v. Gaines, 2 Va. Cas. 172; State v. Main, 16 Wis. 398; People v. Merrill, 2 Parker, Cr. R. (N. Y.) 590; Tyler v. People, 8 Mich. 320, 342.

[8] State v. Knight, 3 N. C. 109; People v. Merrill, 2 Parker, Cr. R. (N. Y.) 590. Contra, Hanks v. State, 13 Tex. App. 289.

other state, it would be void, as a state could not declare such acts criminal and punish them.[9] It has, however, been held by high authority that under a statute enacting that if a mortal wound is given, or other injury inflicted, without the state, whereby death ensues within the state, such offense may be punished in the county where the death happens. A foreigner may be convicted of manslaughter of one who dies within the state from a wound inflicted on a foreign ship on the high seas.[10] On this point, also, the decisions are in conflict.[11]

Courts Sitting in Foreign Countries.

A government has the power to have its courts sit in foreign barbarous or unsettled countries, but it has such power in civilized countries only with their consent. In pursuance of treaties with China, and other countries, congress has given to United States ministers and consuls power to arraign and try all citizens of the United States charged with offenses against law committed in those countries, and has given similar power to consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States.[12]

Acts without, Taking Effect within, Territorial Limits.

The locality of a crime is the place where the act takes effect. As stated in the principal text, a person without the

[9] State v. Knight, supra.

[10] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89. See, also, People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[11] State v. Carter, 27 N. J. Law, 499. See, also, Reg. v. Lewis, Dears. & B. Cr. Cas. 182; State v. Kelly, 76 Me. 331, 19 Am. Rep. 620; 1 Bish. New Cr. Law, §§ 114–116. Post, p. 422.

[12] Rev. St. U. S. §§ 4084, 4088; In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562.

territorial limits of a country may commit a crime within such limits. As we have seen, a person may commit a crime through an innocent agent, and be guilty as a principal in the first degree; so that he may be in England, Mexico, or some other country, while his agent is committing the act in the United States. For instance, suppose a person in England gives poison to a person there, who is ignorant of its nature, to be administered to a person in the United States, and it is there administered, and the person dies; or suppose a person in England procures an innocent agent to bring forged paper to the United States, and negotiate it. In either case he commits a crime in the United States, and may be there punished if he can be found therein or extradited. So, also, if a person, standing in Mexico or Canada, shoots a person standing in the United States, he may be punished here for the homicide, as the shot takes effect here.[13] And, conversely, if a person standing in the United States shoots a person standing in Mexico, he cannot be punished here for the homicide.[14] The same observations are applicable to the states, where acts are committed in one of them, and take effect and constitute a crime in another. Thus, if a person causes a nuisance in a stream in one state, by building a bridge or dam, or polluting the water, and it results in injury in another state, he is criminally liable in the latter state; and one who publishes a libel in one state in a newspaper which circulates in another may be prosecuted in the latter.[15]

On the other hand, if a person without the territorial

[13] Rex v. Coombes, 1 Leach, 388.

[14] U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; State v. Hall, 114 N. C. 909, 19 S. E. 602, 28 L. R. A. 59, 41 Am. St. Rep. 822.

[15] Adams v. People, 1 N. Y. 173; Thompson v. Crocker, 9 Pick. (Mass.) 59; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214, Lindsey v. State, 38 Ohio St. 507.

limits of a state procures a felony to be committed within the territorial limits by means of a guilty agent, who is responsible to the laws of the state, the procurer is only an accessary before the fact, and is amenable only to the laws of the foreign state, if at all. He is not to be deemed as constructively present in the state where the crime is committed, and cannot be punished as an accessary in that state.[16]

Homicide—Death within Limits from Blow without.

Again, suppose a foreigner within the limits of a foreign country, or, what, as has been seen, is the same thing, on board a foreign vessel on the high seas, inflicts a wound, and the wounded person comes into the United States, and dies; can he be punished here? It is the act, and not the result of the act, which determines the locality of the homicide; and if a man strikes a mortal blow in one state or country, and the person struck dies in another state or country, the homicide is committed in the first.[17] Whether a statute punishing such a homicide in the state where death occurs is valid has been the subject of controversy. Mr. Bishop maintains that to punish the offender here would be contrary to the law of nations, on the ground that the homicide is committed where the fatal blow is struck, and that a country has no right to punish a foreigner for an act committed in a foreign country;[18] and this view is

[16] State v. Moore, 6 Fost. (N. H.) 448, 59 Am. Dec. 354; State v. Wyckoff, 31 N. J. Law, 65; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452; Johns v. State, 19 Ind. 421, 81 Am. Dec. 408. Contra, State v. Grady, 34 Conn. 118; State v. Ayers, 8 Baxt. (Tenn.) 96.

[17] State v. Gessert, 21 Minn. 369; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; U. S. v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247; Riley v. State, 9 Humph. (Tenn.) 646; People v. Gill, 6 Cal. 637; Stout v. State, 76 Md. 317, 25 Atl. 299.

[18] 1 Bish. New Cr. Law, §§ 114–116.

sustained by an English decision, under a statute making liable to punishment in England one who poisons or strikes a person upon the sea or at any place out of England, and the death from the stroke or poison occurs in England. The English court held that the statute did not apply to a foreigner striking another foreigner on an American ship on the high seas.[19] The question has several times arisen in the state courts, and is more apt to arise there. If the blow is given by a citizen of the state or other government within whose limits death occurs, the right to punish would depend on whether the state has a right to punish its citizens for acts abroad.[20] If the blow is given by a foreigner, the power to punish him must depend on what is to be deemed the locality of the homicide. The validity of such a statute has been upheld in some states upon the ground that the blow, although inflicted without the state, continues to operate, and that the wrongdoer is therefore liable for the homicide in the place where his victim dies from the continuous operation of the mortal blow; and such states where legislative authority exists punish citizens and foreigners alike for a blow without, causing death within, their limits.[21] Other courts have denied the validity of such statutes so far as they apply to foreigners, and, unless their validity is to be upheld upon some other ground than that the homicide is, under these circumstances, committed partly within the jurisdiction,[22] this conclusion appears to be sound.

[19] Reg. v. Lewis, Dears. & B. Cr. Cas. 182.

[20] Ante, p. 418.

[21] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89. See, also, People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320; Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436, 15 L. R. A. 226, 32 Am. St. Rep. 831; State v. Caldwell, 115 N. C. 794, 20 S. E. 523.

[22] State v. Carter, 27 N. J. Law, 499. Cf. Hunter v. State, 40

Larceny—Property Stolen in One State and Brought into Another.

Again, property may be stolen in one state and brought into another. Can the latter state punish the thief? It has been held from the earliest times that if a thief steals goods in one county, and brings them into another, he may be indicted in either, because his unlawful carrying in the second is deemed a continuance of the unlawful taking,—a continuing trespass,—and so all the essential elements of larceny exist in the second.[23] If, however, the original taking is abroad, and the goods are afterwards brought by the thief into England, it is not larceny, because there has been no taking against the law which is invoked to punish him.[24] Upon principle the same rule ought to prevail where the original taking is without the United States and the goods are afterwards brought into one of the states,[25] or where the original taking is in one state and the goods are brought into another state,[26] although the preponderance of author-

N. J. Law, 495. See, also, State v. Kelly, 76 Me. 331, 19 Am. Rep. 620. Ante, p. 421.

[23] 4 Bl. Comm. 305.

[24] Rex v. Anderson, 2 East, P. C. 772; Rex v. Prowes, 1 Moody, Cr. Cas. 349; Reg. v. Debruiel, 11 Cox, Cr. Cas. 207; Reg. v. Carr, 15 Cox, Cr. Cas. 131, note.

[25] Com. v. Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762; Com. v. White, 123 Mass. 433, 25 Am. Rep. 116; Stanley v. State, 24 Ohio St. 166, 15 Am. Rep. 604; Lee v. State, 64 Ga. 203, 37 Am. Rep. 67. Contra, State v. Bartlett, 11 Vt. 650; State v. Underwood, 49 Me. 181, 77 Am. Dec. 254.

[26] People v. Gardner, 2 Johns. (N. Y.) 477; People v. Schenck, 2 Johns. (N. Y.) 479; State v. Brown, 2 N. C. 100, 1 Am. Dec. 548; Lee v. State, 64 Ga. 203, 37 Am. Rep. 67; State v. Le Blanch, 31 N. J. Law, 82; Beal v. State, 15 Ind. 378; People v. Loughridge, 1 Neb. 11, 93 Am. Dec. 325; State v. Reonnals, 14 La. Ann. 278. See dissenting opinion of Thomas, J., in Com. v. Holder, infra. Contra, Com. v. Holder, 9 Gray (Mass.) 7; Hamilton v. State, 11

ity upholds the view that, if the original taking was in another state, the case is analogous to bringing stolen goods into one county from another, where they were taken. In many states statutes have been enacted providing that a person who has without the state stolen goods and who brings them into the state may be convicted of larceny.

The same conflict of authority is met with in the crime of receiving stolen goods. On principle, in the absence of statute, the goods must have been stolen within the jurisdiction of the receiving, and it has been so held in England; but there are decisions in this country to the contrary where the goods were stolen in another state.[27]

FEDERAL COURTS AND THE COMMON LAW.

169. The federal courts have no criminal jurisdiction by virtue of the common law ex proprio vigore, and can exercise such jurisdiction only as is expressly conferred upon them by congress.

170. Where, however, congress has declared certain acts crimes without defining them, and conferred jurisdiction thereof, the courts may look to the common law for their definition.

This question came before the supreme court of the United States early in the present century. One Hudson and another had been indicted for publishing a libel on the president and congress of the United States. No jurisdiction to punish for such an act had been conferred upon the federal circuit courts by any act of congress, and the judges

Ohio, 435; Worthington v. State, 58 Md. 403, 42 Am. Rep. 338; Stinson v. People, 43 Ill. 397; State v. Hill, 19 S. C. 435; Watson v. State, 36 Miss. 593; State v. Johnson, 2 Or. 115; State v. Bennett, 14 Iowa, 479; Ferrill v. Com., 1 Duv. (Ky.) 153.

[27] Ante, p. 330.

of the circuit in which the indictment was pending, being divided in opinion as to whether such jurisdiction existed at common law, certified the case to the supreme court. That court held that the indictment could not be sustained. It was said by the court: "The powers of the general government are made up of concessions from the several states. Whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions. That power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only—the supreme court—possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer." [1] The opinion then states that, before the federal courts can punish acts done by an individual in supposed violation of the peace and dignity of the United States, the legislative authority of the Union must first make the act a crime, affix a punishment, and declare the court that shall have jurisdiction of the offense; that the exercise of criminal jurisdiction in common-law cases is not within their implied powers. In view of this decision, to determine whether an act is a crime against the United States, and whether the federal courts have power to punish it, we must look to the acts of congress; and, unless the jurisdiction be thereby conferred, it does not exist.

§§ 169–170. [1] U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259.

Common Law Supplies Definitions.

Though the federal courts derive no jurisdiction from the common law, yet, where congress has conferred jurisdiction of a crime in general terms, without defining it, they may look to the common law for its definition. Thus, an act of congress declares murder, manslaughter, rape, and other crimes upon the high seas or in certain specified places to be crimes punishable in the federal courts, but does not define those crimes.[2] Their definition, therefore, must be determined by the common law of the place where the court sits.[3]

JURISDICTION CONFERRED ON FEDERAL COURTS BY CONGRESS.

171. As has been stated, the federal courts have such jurisdiction only as is expressly conferred by act of congress, and congress can confer such jurisdiction only as is authorized by the constitution.

We have already seen what powers the constitution has conferred on congress. We shall now see in a general way the extent to which it has exercised them. Mr. Wharton has collected the various provisions under five heads: (1) Offenses against the law of nations; (2) offenses against federal sovereignty; (3) offenses against the persons of individuals; (4) offenses against property; and (5) offenses against public justice.[1]

Offenses against the Law of Nations.

This head includes breaches of neutrality, or hostile acts by citizens of the United States in aid of a foreign state against another foreign state which is at peace with the

[2] Rev. St. U. S. § 5335.

[3] 1 Whart. Cr. Law, § 255.

§ 171. [1] Id. § 257 et seq.

United States, such as serving against such a state under commission from a foreign state, or fitting out vessels within the United States to cruise against such state, or rendering other assistance within the United States by furnishing vessels or setting on foot an armed force. There are also included under this head offenses against foreign ministers or ambassadors and their servants, such as violation of passports, or violence, and suing out or executing process against them.[2]

Offenses against Federal Sovereignty.

Under this head are included treason and misprision of treason, treasonable correspondence with foreign governments, and certain acts of hostility against the United States; offenses against the elective franchise; illegally holding office; offenses against Indians; offenses by subjects abroad; perjury and forgery abroad; offenses against the post office; counterfeiting; piracy; revolt; and the slave trade.[3]

Offenses against the Persons of Individuals.

Under this head may be mentioned murder and manslaughter in any fort, dockyard, or other place under the exclusive jurisdiction of the United States; murder, manslaughter, or rape upon the high seas, or in any river, haven, basin, or other like place out of the jurisdiction of the United States.[4]

Offenses against Property.

Among these are custom house frauds; burning a dwelling house within a fort, dockyard, or other place under the jurisdiction of the United States, or any arsenal, armory, vessel, or public stores; stealing within any of the places

[2] Rev. St. U. S. §§ 4062, 4064, 5285, 5286.

[3] 1 Whart. Cr. Law, § 259, where the statutes are collected or mentioned in full.

[4] 1 Whart. Cr. Law, § 260.

ler the exclusive jurisdiction of the United States; lar-
y, robbery, or embezzlement from the mails, etc.[5]

enses against Public Justice.

Jnder this head may be classed bribery of United States
ges or legislators; extortion and embezzlement by public
cers, and other misconduct in office; obstructing United
tes officers in the service of process; obstructing justice
the federal courts by intimidating, influencing, or im-
ling any juror, witness, or officer; and perjury in the
ited States courts.[6]

PERSONS SUBJECT TO OUR LAWS.

. GENERAL RULE—As a rule, all persons within the ter-

mere commercial agents, are not exempt, and may be criminally liable for their acts. It is probable that a minister would forfeit his privilege if he were to be guilty of treason against our government. The exemption does not deprive one of our citizens from defending himself against an assault by a foreign minister, but he may repel force by force. Foreign friendly armies or navies, if peaceably in our harbors or passing through our territory by our consent, represent their sovereigns, and are not subject to our laws; but the rule does not apply to foreign merchant vessels.[1]

§§ 172–173. [1] 1 Bish. New Cr. Law, § 124 et seq.; 1 Kent, Comm. 38 et seq.; State v. De la Foret, 2 Nott & McC. (S. C.) 217; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. Ed. 59.

CHAPTER XVIII.

FORMER JEOPARDY.

IN GENERAL.

174. No man can be put twice in jeopardy for the same offense.[1]

EXCEPTION—A person may waive the right to plead former jeopardy.

It is said by Blackstone that the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the English common law: that no man is to be brought into jeopardy of his life more than once for the same offense; and hence it is allowed as a consequence that when a man is once found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime.[2] It is also said by the same commentator that the plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, is a good plea in bar to an indictment.[3] This was the common law. By the constitution of the United States, however, it is provided that "no person shall be * * * subject, for the same offense, to be twice put in jeopardy of life and limb";[4]

§ 174. [1] For a fuller treatment of this subject, see Clark, Cr. Proc. pp. 382–407.

[2] 4 Bl. Comm. 335.

[3] Id. 336.

[4] Const. U. S. Amend. art. 5.

and there are similar provisions in the constitutions of the different states. These provisions are probably merely declaratory of the doctrine of the common law. Under them there need be no former acquittal or conviction to bar a subsequent prosecution for the same offense. It is sufficient if the accused has once been put in jeopardy.

What Constitutes Jeopardy.

After a person has once been put upon his trial before a court of competent jurisdiction, upon an indictment or information, which is sufficient to sustain a conviction, and the jury has been charged with his deliverance, he is in jeopardy; and if afterwards for any reason the jury are discharged unnecessarily and without his consent, he is entitled to his discharge, and cannot again be tried.[5] Discharge of a prisoner by a committing magistrate, or refusal of a grand jury to indict him, does not prevent a subsequent prosecution, as there is no jeopardy.[6] Jeopardy only begins when defendant pleads to the indictment, and has been put upon his trial, and this is not until the jury has been fully impaneled and sworn.[7] At any time before this, the prosecution may be discontinued without prejudice

[5] Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; Price v. State, 19 Ohio, 423; State v. Sommers, 60 Minn. 90, 61 N. W. 907.

[6] McCann v. Com., 14 Grat. (Va.) 570; Com. v. Hamilton, 129 Mass. 479; Com. v. Miller, 2 Ashm. (Pa.) 61; State v. Whipple, 57 Vt. 637; Ex parte Clarke, 54 Cal. 412. But if the magistrate has jurisdiction to try, and takes jurisdiction, a plea of former jeopardy is good. State v. Bowen, 45 Minn. 145, 47 N. W. 650; Com. v. Sullivan, 156 Mass. 487, 31 N. E. 647.

[7] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; Stuart v. Com., 28 Grat. (Va.) 950; State v. Hastings, 86 N. C. 596; Alexander v. Com., 105 Pa. 1; State v. Burket, 2 Mill, Const. (S. C.) 155, 12 Am. Dec. 662.

to a new indictment and a prosecution thereon.[8] As soon, however, as the jury has been sworn, jeopardy begins;[9] and if, after that, the indictment is quashed, or a nolle prosequi entered, the defendant is entitled to his discharge.[10]

Same—Jurisdiction.

It is essential to constitute jeopardy that the court in which the accused is put upon his trial shall have jurisdiction. If it is without jurisdiction, there can be no valid conviction, and hence there is no jeopardy.[11] There must be a sufficient indictment, or the court has no authority to proceed; and therefore if the indictment is invalid, because of fatal defects in the organization or constitution of the grand jury, or because it is so defective in its allegations that a conviction will be set aside, there is no jeopardy.[12]

Same—Several Sovereignties.

Where the same act constitutes a distinct offense against each of several sovereignties, a prosecution by one does

[8] Com. v. Tuck, 20 Pick. (Mass.) 356; State v. McKee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Clarke v. State, 23 Miss. 261.

[9] Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; Morgan v. State, 13 Ind. 215; People v. Webb, 38 Cal. 467; Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708.

[10] People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; O'Brian v. Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715; Com. v. Hart, 149 Mass. 7, 20 N. E. 310; Klock v. People, 2 Parker, Cr. R. (N. Y.) 676.

[11] Com. v. Peters, 12 Metc. (Mass.) 387; Weaver v. State, 83 Ind. 289; State v. Parker, 66 Iowa, 586, 24 N. W. 225; Phillips v. People, 88 Ill. 160; State v. Odell, 4 Blackf. (Ind.) 156; State v. Hodgkins, 42 N. H. 474; State v. Weatherspoon, 88 N. C. 19; State v. Charles, 16 Minn. 474 (Gil. 426).

[12] Weston v. State, 63 Ala. 155; Kohlheimer v. State, 39 Miss. 548, 77 Am. Dec. 689; People v. Clark, 67 Cal. 99, 7 Pac. 178; Com. v. Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139; Pritchett v. State, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468.

not necessarily bar a prosecution by the other. An act which is an offense both against a state and against the United States may be punished by both, and a plea of former jeopardy in the federal court will not be a bar to a prosecution in the state court, or vice versa.[13] The same rule has with less reason generally been applied to acts which are offenses both under municipal ordinances and under the general laws of the state.[14]

Discharge of Jury.

If jeopardy has in fact once attached, the jury cannot be unnecessarily discharged without the defendant's consent without entitling him to his discharge.[15] But, if necessity arises, the jury may be discharged without this result. If, for example, a juror escapes before a verdict is rendered, or is guilty of any misconduct making it impossible to proceed with the trial, or is discovered, after being sworn, to be disqualified, the defendant may be tried again.[16] So, where the jury are unable to agree, and are discharged.[17] If the

[13] Moore v. Illinois, 14 How. 13, 14 L. Ed. 306; U. S. v. Barnhart, 10 Sawy. 491, 22 Fed. 285; Abbott v. People, 75 N. Y. 602; Hendrick v. Com., 5 Leigh (Va.) 707; Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621. See Clark, Cr. Proc. 394.

[14] Ante, p. 431.

[15] Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; People v. Barrett, 2 Caines (N. Y.) 304, 2 Am. Dec. 239.

[16] State v. Hall, 9 N. J. Law, 256; State v. McKee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Com. v. McCormick, 130 Mass. 61, 39 Am. Rep. 423; State v. Allen, 46 Conn. 531; Stone v. People, 2 Scam. (Ill.) 326; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968 (where by reason of facts existing when jury is sworn, but not known to court, or of outside influence, jury is not impartial).

[17] U. S. v. Perez, 9 Wheat. 579, 6 L. Ed. 165; Simmons v. U. S., supra; Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; Com. v. Cody, 165 Mass. 133, 42 N. E. 575; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; People v. Pline, 61 Mich. 247.

defendant consents to the jury's discharge, he waives his right to plead former jeopardy on a subsequent prosecution.[18]

Waiver by Defendant.

The defendant may waive his right to plead former jeopardy, either expressly or impliedly; as, for instance, where the jury is discharged during the trial with his consent;[19] where no objection is made to a verdict that is so defective that judgment cannot be entered thereon;[20] where there is a mistrial, because defendant is of his own accord absent when the verdict is rendered, when he should be present;[21] where he procures a verdict or judgment to be set aside on his own motion in arrest or for a new trial;[22] or where he withdraws a plea of guilty by leave of court, and consents to entry of a nolle prosequi.[23]

Identity of Offenses.

To sustain a plea of former jeopardy, the two offenses must be the same, according to the express provision of the constitution. Former jeopardy for another offense, or for-

28 N. W. 83; Winsor v. Reg., L. R. 1 Q. B. 289. Contra, Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; Williams v. Com., 2 Grat. (Va.) 570, 44 Am. Dec. 403.

[18] See following note.

[19] Williams v. Com., 2 Grat. (Va.) 567, 44 Am. Dec. 403; State v. McKee, 1 Bailey (S. C.) 651, 21 Am. Dec. 499; Stewart v. State, 15 Ohio St. 155.

[20] Wright v. State, 5 Ind. 527; Wilson v. State, 20 Ohio, 26.

[21] State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; People v. Higgins, 59 Cal. 357.

[22] Sutcliffe v. State, 18 Ohio, 469, 51 Am. Dec. 459; Clark v. State, 4 Humph. (Tenn.) 254; People v. McKay, 18 Johns. (N. Y.) 212; Lane v. People, 5 Gilman (Ill.) 305; Joy v. State, 14 Ind. 139; State v. Knouse, 33 Iowa, 365; People v. Barrie, 49 Cal. 342; Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; People v. Hardisson, 61 Cal. 378; Veatch v. State, 60 Ind. 291.

[23] Ledgerwood v. State, 134 Ind. 81, 33 N. E. 631.

mer acquittal or conviction of another offense, is no bar. It is often a difficult question to determine whether the offenses are the same, and the decisions are not in accord.

Only the general rules can be stated, and for a full discussion the student is referred to works upon criminal procedure. (1) It is the general rule that if the crimes are so distinct, either in fact or law, that evidence of the facts charged in the second indictment would not have supported a conviction under the first, the offenses are not the same, and the second indictment is not barred. Thus, where there has been an acquittal on the ground of variance, a new indictment, in which the crime is correctly described, will lie. (2) If the charges are in fact for the same offense, though the indictment differs in immaterial circumstances, the defendant may plead his former acquittal or conviction, with proper averments to show the identity of the charges. (3) If the defendant could have been convicted, under the first indictment, of the offense charged in the second, an acquittal or conviction under the former indictment is a bar to the second. A former acquittal or conviction of an offense including a lesser offense is a bar to a subsequent prosecution for the lesser offense. (4) If the defendant could have been convicted of the offense charged in the first indictment on proof of the facts charged in the second, though he could not have been convicted of the whole of the offense charged in the second, the second indictment is barred, for the former acquittal has negatived the existence of the facts charged in the second. A former acquittal of a lesser offense which constitutes a necessary part of a higher crime is a bar to a subsequent prosecution for the higher crime. (5) By weight of authority, if the prosecuting officer elects to prosecute for an act constituting a certain offense, and the defendant is convicted of that offense, he cannot afterwards be prosecuted for the same act under aggravating circum-

stances which change its legal character. But if the aggravating circumstances do not intervene until after the first conviction,—as where, after a conviction for assault and battery, the person assaulted dies,—it is otherwise. A former conviction of a lesser offense which constitutes a necessary part of a higher crime is a bar to a subsequent prosecution for the higher crime. (6) Where the same act constitutes distinct offenses, neither an acquittal nor a conviction for one offense will bar a subsequent prosecution for the other.[24]

[24] See Clark, Cr. Proc. pp. 396–405.

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